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IN THE

Supreme Court of the United States

October Term, 1965
No. 559

JAMES THOMSON, etc., *et al.*,
Plaintiffs, Appellants and Petitioners,

vs.

THOMAS CARMAN, etc., *et al.*,
Defendants and Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California and Brief in Support Thereof.

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clusions of Law p. 431], and further did the Trial Court in its judgment substantially err in that the Findings of Fact 18, 19, 20, 21, 22, 24, 27, 29, 30, 31, 32, 35, 37, 38, 39, 40 to 42 inclusive, and 55 to 59 inclusive, are not supported by the substantial evidence, and are in contradiction of the weight of the evidence and the applicable law and fundamentally contravene the constitutional proscription of the Constitution of the United States, Article I, Section 10, Cl. 1, with respect to the impairment of contracts 40

2. Did the Trial Court in said erroneous Findings of Fact, Conclusions of Law and Judgment in favor of defendants and respondents and against plaintiffs, appellants and petitioners, and the District Court of Appeal by its opinion, and the Supreme Court of the State of California by the denial of a hearing create a miscarriage of justice and a fundamental violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and by extrapolation of the Fourteenth Amendment, violate Article I, Sections 9 and 1 of the Constitution of the State of California 49

3. Did the District Court of Appeal in its opinion, and the Supreme Court of the State of California by affirmance in its denial of a hearing, fundamentally and materially, both by omissions and inaccurate conclusions affect the fundamental rights of plaintiffs, appellants and petitioners in violation of Article I, Section 10, Cl. 1, and the First, Fifth and

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Defendants and Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California and Brief in Support Thereof.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners herein, plaintiffs and appellants, named in the complaint and in behalf of those similarly situated, as a class suit, pray that a Writ of Certiorari issue to review a judgment of the Supreme Court of the State of California denying a hearing upon appeal to said Supreme Court of the State of California, from a decision rendered by the District Court of Appeal of the State of California at 2nd Civil No. 27179; which decision was rendered on February 23, 1965, and the denial of a hearing was filed and entered by the Su-

preme Court of the State of California on May 12, 1965. Petitioners, five in number, in behalf of approximately 350 members of the International Sound Technicians, Local 695, hereinafter called "LOCAL 695", filed their complaint in the Superior Court of the State of California, in and for the County of Los Angeles, naming approximately 100 defendants [Complaint, Clk. Tr. p. 1].* In this particular petition and in the proceedings on appeal in the major matter herein, the actual particular respondents are:

(a) Defendant-respondent International Alliance of Theatrical Stage Employees, hereinafter called "International";

(b) Thomas Carman, Business Representative, and additional defendant-respondents who were, during the occasions involved, members of the Negotiating Committee of said Local 695; and defendant-respondents who were, during the occasions involved, members of the Executive Board of said Local 695;

(c) Defendant-respondent Richard Walsh, president of the International, and defendant-respondent George Flaherty, International Representative of the International.

(d) The Association of Motion Picture Producers, Inc., a California corporation, representing major motion picture producers and/or film television, hereinafter referred to as the "Association," and its representative, and their affiliated major film companies.

*Clk. Tr. refers to Clerk's Transcript.

(e) The Alliance of Television Film Producers, Inc., a California corporation, and representative of television film producers, hereinafter referred to as the "Alliance," and its representative, and their affiliated television film producers.

The above represents the defendant-respondents involved in this immediate Petition for Writ of Certiorari.

Petitioners respectfully request that the petition for review on this Writ of Certiorari be granted on the following bases:

(a) That the District Court of Appeal and the Supreme Court of the State of California have decided a Federal question of substance which actually has not theretofore been determined by this Honorable Court;

(b) Moreover, said District Court of Appeal and Supreme Court of the State of California have rendered a decision which is not in accord, probably, with the appliable decisions of this Honorable Court;

(c) That the District Court of Appeal of the State of California in its decision and denial of a hearing by the Supreme Court of the State of California have violated fundamentally the Fifth and Fourteenth Amendments to the Constitution of the United States, have impaired the obligation of contract under the Constitution of the United States Article I, section 10, cl. 1, and, by extrapolation of the Fourteenth Amendment, have violated Article I, Sections 9 and 13 of the Constitution of the State of California.

It is our sincere belief that there is not in existence a case actually or specifically in point, whether as to the facts or the law, although there have been decisions with general pronunciamentos. While three United States Supreme Court cases, which are deemed to be governing cases, citing others therein, which we will discuss below, use general language as to the obligation of negotiations under Section 9a of the Labor Management Relations Act of 1947, as Amended, and under the Labor Management Reporting and Disclosure Act of 1949, as Amended, nonetheless an actual reading of the facts impels that there be a granting of this Certiorari since even these cases are authority for the prevention of divestiture of certain fiscal rights of a minority group, numerically, and for the requirement that an agreement entered into in good faith, and without qualification as to the wage increases incorporated therein, must be observed.

Without belaboring the question, it is clear that a majority of a union may decide questions before it.

By the same token, the individual rights of a member or of a minority group, has been increasingly and zealously guarded by tthis Honorable Court. We will discuss the details in the Argument below.

Simply stated, the generality that a union through its officers may at any time change or amend the contract, even though wages have been granted specifically and in detail, as long as there is no hostile discrimination against a minority group, lies fallow measured against the actual facts of the cases involved.

In the instant matter, a general wage increase was granted by negotiations between the International in-

volved and all of the executives involved for the motion picture industry. It was a general wage increase, affecting 22 unions and thousands of employees. Each and every union involved and each and every employee involved received the wage increase with the exception of plaintiffs of Local 695 at a purported meeting when, rather not clearly, the majority present, who had nothing to lose, voted that the petitioning minority herein receive no increase and that the increase of the petitioning minority be added to a group of the majority.

The increase was embodied in a Memorandum of Agreement signed by the International head of the unions and by one of the executives of the major motion picture and television groups. The general increase was bruited, as will be clearer below, in the trade papers officially designated by the negotiations; it was subsequently advertised in the official bulletin of the International, and in fact the additional increase of 5% the following year was granted to all 22 unions in accordance with a Memorandum Agreement, except that petitioners herein had the 5% superimposed on no wage increase for the preceding year.

We sincerely subscribe that this is not the law. We believe that there is an obligation, since hostility and discrimination cannot sometimes be proved, on those representing labor to not only collectively bargain in good faith, but once an agreement is reached to abide by that agreement, indiscriminately with respect to all involved in the agreement.

As will be discerned below, the Memorandum Agreement involved specifically made changes as to financial matters with respect to specifically named Locals. There were no changes embodied in the Memorandum Agree-

ment as to the wages with respect to Local 695. In fact, the Memorandum Agreement merely spoke of language changes and language changes could not mean wage changes.

The cases cited in the Argument by this Honorable Supreme Court go beyond the mere granting to the upper echelon of a union a "fillip" change in an agreement, even though it may be passed by a majority, when an agreement has been reached and signed and granted to all those named.

The petitioners, as well as the rest of the remaining members of Local 695, pay dues and were entitled to rely upon the representation that the Memorandum Agreement in the form of a general wage increase applied to them.

They were entitled to rely upon the official bulletin of their International. They were entitled to rely upon the trade papers announcing the general wage increase without change, which announcement was contemporaneous with the date of the execution of the Memorandum of Agreement.

This is particularly and peculiarly so, since the International negotiations proceeded contemporaneously with the Local negotiations, and were concluded *after* the Local negotiations.

Ergo, everything was merged in the Memorandum of Agreement. We sincerely believe that the facts and the law hereunder should prevail and the Petition for Writ of Certiorari be granted and this Honorable Court state so that millions of wage earners who are members of unions, and non-members who are protected by the several Acts, can know whether they can rely upon a

contract that has been entered into or whether at any stage of the proceedings with or without cause, the contract can be changed to take away wage increases. If the latter is true, then we believe this Honorable Court should so state so that perhaps millions of organized labor and non-organized labor can effect a proper remedy. Otherwise, there is chaos and confusion.

We submit additionally that the major cases cited and which we will discuss below refer to amendments which were specifically permitted and implicitly part of the Agreements involved.

In the instant matter, the Memorandum of Agreement provided for changes only as expressed therein. There was no other provision for any other amendment or change during the life time of the Agreements.

Predicated upon the above, we earnestly request that the petition be granted.

I.

REFERENCE TO OFFICIAL REPORT OF OPINION BELOW.

Petitioners perfected an appeal to the District Court of Appeal of the State of California, Second Appellate District at 2nd Civil No. 27179.

On February 23, 1965, said District Court of Appeal of the State of California filed its Opinion affirming the decision of the Trial Court in this matter, the Opinion of the District Court of Appeal being reported in 42 Cal. Rptr. 785 and a copy thereof appearing in full in the appendix hereat at page 3 thereof, and a copy thereof has heretofore been requested to be included in the Supplemental Clerk's Transcript to be transmitted to the Clerk of this Court for printing.

This petition is directed both to the Opinion of the District Court of Appeal and to the Supreme Court of the State of California affirming said Opinion by denial of a hearing and in effect, constituting a judgment of affirmance.

II.

STATEMENT AS TO JURISDICTION.

The action undertaken by plaintiffs, appellants and instant petitioners is pursuant to Section 301 of the Labor Management Relations Act, 1947, as Amended (29 U.S.C. Section P 185(a)), which authorized such actions.

In *Charles Dowd Box Co. v. Courtney,* 82 S. Ct. 519, 368 U.S. 502 (1962) the Supreme Court states:

> "Section of Labor Management Relations Act providing that suits for violation of contracts between employer and labor organization representing employees in industry affecting commence may be brought in Federal District Court did not divest State Court of jurisdiction over such suits. Labor Management Relations Act, 1947, Section 301(a), 29 U.S.C.A. Section 185 (a)."

In the most recent case of *International Longshoremen's and Warehousemen's Union v. Paul R. Kuntz, et al.,* 334 F. 2d 165, the Court recognized, unequivocally, the right to maintain action under Section 301 of the Labor Management Relations Act, either in State Court or United States District Court.

It appears clear, therefore, that this Honorable Court does have jurisdiction with respect to this petition, and in this matter.

III.

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Trial Court, and thereby the Opinion of the District Court of Appeal, and thereby the denial of a hearing by the Supreme Court of the State of California, substantially and materially err in rendering an affirming judgment for defendants and respondents, in view of the entire record of this case, in contradiction of the Trial Court's Findings of Fact 2, 3, 17, 28, 33, 34 and 36, and in contradiction of the Trial Court's Conclusions of Law 2, 3, and 5 [Clk. Tr. Findings of Fact, p. 397; Conclusions of Law p. 431]; and further, did the Trial Court in its judgment substantially err in that the Findings of Fact 18, 19, 20, 21, 22, 24, 27, 29, 30, 31, 32, 35, 37, 38, 39, 40 to 52 inclusive, and 55 to 59 inclusive, are not supported by the substantial evidence, are in contradiction of the weight of the evidence and the applicable law and fundamentally contravene the constitutional proscription of the Constitution of the United States, Article I, Section 10, cl. 1 with respect to the impairment of contracts.

2. Did the Trial Court in said erroneous Findings of Fact, Conclusions of Law and Judgment in favor of defendants and respondents and against plaintiffs, appellants and petitioners, and the District Court of Appeal by its Opinion, and the Supreme Court of the State of California by the denial of a hearing create a miscarriage of justice and a fundamental violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and by extrapolation of the Fourteenth Amendment, violate Article I, sections 9 and 13 of the Constitution of the State of California.

3. Did the District Court of Appeal in its Opinion, and the Supreme Court of the State of California by affirmance in its denial of a hearing, fundamentally and materially, both by omissions and inaccurate conclusions affect the fundamental rights of plaintiffs, appellants and petitioners in violation of Article I, Section 10, cl. 1, and the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and by extrapolation Article I, Sections 9 and 13 of the Constitution of the State of California.

4. Did the Trial Court, the District Court of Appeal in its Opinion, and the Supreme Court of the State of California in denial of a hearing, violate the fundamental rights of the plaintiffs, appellants and petitioners herein as protected under Section 9a of the Labor Management Relations Act of 1947, as Amended (June 23, 1947, c. 121, Title 1, Section 101, 61 Stat. 143; 29 U.S.C. Section 159).

IV.
INTRODUCTION.

The position of the plaintiffs, appellants and petitioners, simply stated, is that appellants, five in number, suing in behalf of a representative class of approximately 350, as third party beneficiaries, were denied the actually negotiated and concluded wage raises granted to them by their collective bargaining representatives.

We believe there is not a case exactly or specifically in point, either as to the facts or the law, although there have been decisions with general pronunciamentos. There are three United States Supreme Court cases which we will discuss below, which we believe require

a reversal of the judgment against the plaintiffs and appellants in this case, and which are authority for the prevention of divestiture of certain fiscal rights of a minority group, numerically, and for the requirement that an agreement entered into in good faith, and without qualification as to the wage increases incorporated therein, must be observed.

As an exemplar, the nub of this matter is as follows:

Let us assume that ten judges have received a legislative salary increase of ten percent. They meet in conference and six of them propose that a vote be taken whether the salary increase awarded, should be denied to four of them, and instead, added to the ten percent increase of the remaining six. The four protest against a vote being taken, but nonetheless, a vote is taken.

The result is obvious.

Clearly and abysmally, it is fundamentally in error, not only as a matter of conscience, but as a matter of law.

To a great extent, it well may be that this is a case of first impression, even though fundamental legal principles support the position of the plaintiffs, appellants and petitioners.

V.

STATEMENT OF THE CASE.

The Complaint [Clk. Tr. p. 1] seeks relief for breach of contract; for specific performance; for permanent injunction; for general and special damages; for exemplary damages; for the payment of retroactive wages; for a constructive trust and an accounting; for declaratory relief; in equity, for reasonable counsel fees, and for promissory estoppel.

These causes of action, as contended for by the plaintiffs, evolve out of a Memorandum Agreement of 1961, dated January 30, 1961, reached between the respondent Association and Alliance and defendant International [Said Memorandum Agreement, Ex. A of the Complaint: Clk. Tr. pp. 1, 41].

Said Memorandum Agreement, Exhibit A of said Complaint [Clk. Tr. pp. 41, 51], was duly executed by the representatives of the parties thereto as follows:

> "The respective member companies of the Association of Motion Picture Producers, Inc.
> By /s/ Charles Boren
>
> "I.A.T.S.E. and Its Locals
> By /s/ Richard F. Walsh
>
> "The respective member companies of the
> Alliance of Television Film
> Producers, Inc.
> By /s/ Richard W. Jencks
>
> "Basic Crafts (including Local #399, Culinary, Local #40, Local #278, Local #724 and Local #755)
> By /s/ Ralph H. Clare."

Further, said Memorandum Agreement [Clk. Tr. p. 41] also provided:

"1. *General Wage Increases.*

(a) 10% general increase commencing as of January 31, 1961.

(b) An additional 5% increase commencing February 1, 1963.

2. *Term of Agreement.*

The term of this agreement shall be for a period of 4 years commencing with January 31, 1961, and extending to and including January 31, 1965."

The Complaint further alleged that historically, and presently, defendant Local 695 negotiated, through its current international body, and with the collective bargaining representatives of other craft unions, in negotiations with various producer associations, and that such collective bargaining agreements, ultimately agreed upon, were executed by the International and the representatives of the Association and the Alliance, together with the representatives of other craft unions [Clk. Tr. p. 8]; further, that members of the said Local 695, including plaintiffs and those who are similarly situated, have been and are employed by one or more of said defendant companies as Sound Men, or Sound Technicians, in the production of theatrical, television, commercial, technical, and religious motion pictures or films.

The Complaint further alleged that the International is the parent body, not only of the defendant Local 695, but also of additional craft locals consisting of [Clk. Tr. p. 9];

Stage Employees
Mixed Local (Operators and Stage Employees)
Operators
Studio Mechanics
Cameramen
Laboratory Technicians
Motion Picture Costumers
Make-up Artists and Hair Stylists

Motion Picture Studio Grips
Motion Picture Studio Propertymen
Motion Picture Studio Set Electricians
Motion Picture Crafts Service
Motion Picture Studio Cinetechnicians
Motion Picture Studio Art Craftsmen
Treasurers and Ticket Sellers
Theatrical Wardrobe Attendants
Motion Picture Assistant Directors and Script Clerks
First Aid Employees
Motion Picture Film Editors
Broadcasting Studio Employees
Television Broadcasting Employees
Motion Picture Studio Production Technicians
Motion Picture Studio Publicists
Scenic Artists
Exhibition Employees
Motion Picture Studio Cartoonists
Radio and Television Sound Effects
Set Designers and Model Makers
Language Specialists

The Complaint further alleged that the defendant International, through defendant Walsh and other International representatives, have historically negotiated in behalf of all of the local unions affiliated with the International, and have had authority for such negotiations in behalf of all of said local unions and the membership of each of said unions, including defendant Local 695. Further, said Complaint alleged [Clk. Tr. p. 18] that said Memorandum Agreement of 1961, with particular reference to the wage increase of Section 1, page 1 thereof, had been approved and ratified by approximately 23 locals of said International, and that

approximately 17,650 members of said locals, in each and all of their respective classifications, had been and are now enjoying said ten percent general increase as of said January 31, 1961.

The Complaint further alleged that the membership of said Local 695 approximates 1,000, of whom approximately 350, during the times involved, were working under a weekly guarantee known as Schedule B; that the employees working under Schedule C, which is a six weeks guarantee, approximate a minimum of ten to eleven months per year of full employment, while those employees working under Schedule B approximate full employment annually of five to six months [Clk. Tr. p. 19].

The Complaint further alleged that defendants, in concert, and through the medium of Local 695, caused the 350 members working under Schedule B not to receive said wage increase of ten per cent, but that instead, said ten percent wage increase was given to and added to the already given ten percent increase of those employees working as Sound Technicians under Schedule C.

In short, the Complaint alleged, and plaintiffs' proof adduced, the fact that while all of the locals received said ten percent increase effective as of January 31, 1961, and while said employees working in the wage classification of Schedule C of Sound Technicians received not only the initial ten percent increase, but also the additional ten percent taken away from Schedule B employees, the approximately 350 employees working under Schedule B were improperly deprived of their wages and received no increase.

For facility, the classifications and duties and qualifications of Sound Men are listed as follows [Clk. Tr. pp. 6, 7]:

"Y-1—Music Mixer—Mixer responsible for scoring, pre-scoring and post scoring music as assigned.

Y-1—Re-recording Mixer—Mixer responsible for the re-recording assigned to him.

Y-1—Unit Mixer—Mixer assigned to the recording on a production unit.

Y-3a—Supervising Engineer—Soundman assigned at the discretion of the Producer in charge of one or more operating sections of the Sound Department (excluding, however, Directors of Sound, Assistant Directors of Sound, Transmission and/or Research and/or Development Engineers).

Y-4—Operative Supervisor and/or Engineer—Engineer in the Sound Department assigned to operate and be responsible for sound systems, and those operative functions requiring the service of a fully qualified transmission engineer.

Y-5—Amplifier Room Operator—Soundman in a centrally operated plant assigned to the operation and maintenance of proper condition of sound equipment in and associated with the main amplifier room.

Y-6—Technical Testing Engineer and/or Gang Boss—Soundman assigned to precise technical testing and adjustment of sound channels and amplifiers and of such items as light valves, galvanometers, microphones and other similar optical-elec-

tricial, mechanical, and/or audio frequency equipment and/or is in charge of setting up, testing and maintaining sound equipment.

Y-7—Service Recorder and/or Location Engineer—Soundman assigned to service, operate and maintain sound channels and associated equipment.

Y-7a—Service Playback Operator—Soundman assigned to service, maintain, and operate playback equipment.

Y-8—Microphone Room Operator—Soundman assigned to operate the microphone boom and associated equipment; also handle cables and hook-up.

Y-9—Recording Machine Operator—Soundman assigned to set up, test, and operate recording machines.

Y-11—Cableman.

Y-12—Playback Operator.

Y-13—Public Address Operator.

Y-14—Dubbing Room Operator.

Y-15—Magnetic Film Service Man and/or Film Loader."

That historically and presently [Clk. Tr. p. 7] said classified employees, members of said Local 695, during all of the times involved in this matter, have been working for the various defendant corporations on certain minimum guaranteed employment, as follows [Clk. Tr. p. 7]:

Schedule "A" Daily Guarantee

Schedule "B" Weekly Guarantee

Schedule "C" 6-Weeks Guarantee

That the defendants filed Answers to the Complaint denying the allegations and principally alleging that a

subsequent agreement between the Local and the Association and the Alliance superseded and vitiated the Memorandum Agreement of 1961, even though approximately 23 locals received the benefits thereof, and the benefits thereof were given to Schedule C Sound Technicians, on top of their ten percent increase, and taken away from Schedule B employees [Clk. Tr. pp. 322, 254, 59, 232, 182, 153 and 151].

The trial of this matter took place before Honorable Harold W. Schweitzer commencing April 19, 1962, without a jury, and lasted to and including May 9, 1962, with occasional continuances.

The Trial Court, on July 6, 1962, made its Findings of Fact and Conclusions of Law, and on the same day, July 6, 1962, entered judgment for defendants and respondents in this matter [Clk. Tr. pp. 397, 431].

On July 23, 1962, plaintiffs-appellants filed a Notice of Intention to Move for a New Trial [Clk. Tr. p. 437], and on August 2, 1962, the motion for new trial was argued, and said motion was denied [Clk. Tr. p. 444].

The District Court of Appeal, Second District, on February 23, 1965, in its Opinion and Decision, affirmed the Judgment of the Trial Court.

Plaintiffs and appellants filed the Petition for Rehearing, raising what they considered to be fundamentally and materially incorrectly stated facts which they deemed to affect the rights of the plaintiffs and appellants. On March 16, 1965, the Petition for Rehearing was denied, a Petition for Hearing was filed with the Supreme Court of the State of California, and denied May 12, 1965.

It is the position of the plaintiffs and appellants in this matter that it is imperative to secure uniformity of decision, not only for the State of California, but Federally, with respect to the rights of minority members of a Union who have been granted vested rights by contract, and who may be deprived thereof by the subsequent alleged negotiations of their executive officers in concert with the employers involved. It is important to grant this hearing so as to settle the presently unsettled questions of law.

The appellants implicitly feel that they are entitled to and should receive from the respondent companies the retroactive wage increases effective as of January 31, 1961, of ten percent, since otherwise, it would be violative, not only of the Memorandum Agreement of 1961, but also of their legal rights.

VI.

STATEMENT OF FACTS.

The negotiations between the defendant Association, the defendant Alliance, representatives of the major motion picture producers, and of the television film producers affiliated with the Alliance—with defendant Walsh representing defendant International, with defendant Carman representing defendant Local 695, and with the negotiating committees of all the other locals affiliated with the defendant International—continued up to, and were included, on January 28, 1961, and resulted in the Memorandum Agreement of 1961 [Clk. Tr. p. 41; Deft. International's Ex. A, Rep. Tr. p. 51].

The negotiations between the producers and defendant Local 695, purely on a local basis, commenced November 29, 1960, and carried through to January 5, 1961,

and all of the requests or demands by the Local and the counter-positions of the employer negotiators were discussed in detail and finally concluded and merged in said Memorandum Agreement of 1961, without changing the actual wage increases granted in said Memorandum Agreement of 1961.

Because of its importance, we quote from the testimony of Mr. Batchelder, called as an adverse witness under C.C.P. 2055 by counsel for plaintiffs and appellants, since this testimony clearly and quickly resolves not only the factual, but the legal issues in this case [Clk. Tr. Vol. V, p. 1231, line 3, to p. 1236, line 3, incl.], as follows:

> "Q. I want to direct your attention with respect to this matter first to the local negotiations of Local 695 which took place initially, I believe, in December of 1960. Were you present at the first of those negotiations? A. I was but that's not the correct date.
>
> Q. What is the correct date? A. November 29th.
>
> Q. And was Mr. Boren present? A. No, he was not.
>
> Mr. Bakaly: Mr. Batchelder, would you please speak up just a littel bit so we can hear you over here.
>
> Q. (By Mr. Schullman) Now, there were subsequent negotiations to the November date of 1960? A. Yes, sir.
>
> Q. Were there any additional negotiations on a local level for 695 with respect to the period of 1960? A. No.

Q. Now, going into January of 1961, what was the first date in which the local negotiations resumed for 695? A. January the 5th.

Q. Thank you. And at that meeting, Mr. Boren was present? A. He was.

Q. And you were present? A. Yes.

Q. In addition to yourself and Mr. Boren, who else was present representing the association or representing the TV Alliance? A. There were approximately seven representatives from the members of the Association of Motion Picture Producers and five representative from the members of the Alliance of Television Film Producers.

Q. Now, with respect to the meeting of January the 5th, 1961, there were meetings thereafter, is that correct, during January on a local level? A. There was.

Q. And those meetings continued until approximately what date in January? A. The 28th of January.

Q. Was that the morning of the 28th, 1961? A. Yes.

Q. And I believe that that evening there was a continuation of general negotiations? A. Yes, sir.

Q. Now, during the period of the local negotiations which you have enumerated datewise, Mr. Batchelder, I presume there were discussions with respect to the position of the local and with respect to the position of the producers? A. Yes.

Q. That continued during all of the negotiations concerning which you have now discussed? A. Yes.

Q. Incidentially, I was under the assumption there were minutes of those meetings. I was told by Mr. Boren there weren't. There are no minutes of those meetings? A. There are no minutes that I know of.

Q. Now, Mr. Batchelder, I want to now show you—Before I show you this, may I ask you if on the evening of the 28th of January of 1961 the general negotiations continued? A. Yes.

Q. And those general negotiations were concluded that evening? A. Yes.

Q. And in the general negotiations, Mr. Walsh was present? A. Yes.

Q. And representatives of the various locals affiliated with the I.A.T.S.E. were present? A. Yes.

Q. That is business representatives? A. Yes.

Q. I presume that some of the locals had either all or portions of their negotiating committees present? A. Yes.

Q. I show you International Alliance Exhibit A, Mr. Batchelder, entitled memorandum agreement of 1961, January 30th, and ask you if you have seen that document before? A. Yes.

Q. Incidentally, I presume that document was prepared by your office, if you know? A. Yes.

Q. I call attention to the last page or page 10 thereof which bears the typewritten or printed or mimeographed signatures of Charles Boren, Richard F. Walsh, Richard W. Jencks, Ralph H. Clare, and ask you if in fact the original of this document was actually executed by the aforenamed individuals? A. Yes."

The Memorandum Agreement of 1961 [Deft. International's Ex. A; Rep. Tr. p. 51] is a completed and integrated agreement, and covers all of the locals and all of the classifications in the locals affiliated with the defendant International.

The Agreement provides for specific and substantive wages and conditions.

The Agreement covers every facet with respect to all of the locals and, in fact, was so applied and effectuated, with the exception of the ten percent increase vested in and due and owing to the plaintiffs and appellants as third party beneficiaries, and, in fact, as principals.

Where the Agreement had variations with respect to the locals affiliated with the defendant International, it so provided.

The only reservation at the conclusion thereof was the fact that it was to be reduced to final contract language.

The distinction to be observed is "language," and not changes in wages or pension benefits or vacation benefits, or other benefits, unless specifically enumerated and set forth in said Memorandum Agreement of 1961.

In cross-examination of Mr. Richard F. Walsh, defendant and president of the defendant International [Rep. Tr. p. 70 *et seq.*], Mr. Walsh specifically testified: "There were discussions with respect to doing away with Schedule 'C' employees of the Sound Technicians" [Rep. Tr. p. 70, lines 3-11].

This included discussions between the local representatives and the employer representatives [Rep. Tr. p. 70, lines 11-16].

But all of these discussions took place during approximately January 2, 3 or 4, 1961, and were concluded January 28, 1961, after which the Memorandum Agreement was prepared and executed [Rep. Tr. p. 70, lines 16-22].

Mr. Walsh testified that the Memorandum Agreement provided for a general increase of ten percent, effective January 31, 1961, and the increase of five percent effective February, 1963 [Rep. Tr. p. 71, lines 8-14].

He further testified that the increase would be added to the particular wage rates of the various locals, 22 or 24 in number [Rep. Tr. p. 71, lines 14-21].

He testified as to the specific provisions of the Memorandum Agreement, the reduction of golden hours, the application of the reduction to specific locals only [Rep. Tr. p. 72, line 1, to p. 73, line 12 incl.].

Mr. Walsh stated [Rep. Tr. p. 73, lines 13-19] as follows:

> "Q. I ask you to look at this agreement very carefully and ask you where in the memorandum agreement if there appears any language giving Local 695 a right to go back on its own options and to allocate to 10% as it desires? A. There isn't anything in there about it."

Mr. Walsh stated [Rep. Tr. p. 76, lines 5-11] as follows:

> "Q. And then in the negotiations I think you said that Mr. Boren indicated to you that the wage increases as far as he is concerned would be applicable all over straight down the line? A. It would be a complete deal.
>
> Q. That is right."

Mr. Walsh stated [Rep. Tr. p. 80, lines 5-15] as follows:

> "Q. (By Mr. Schullman) And isn't it a fact that every one of the 24 locals, 22 or 24, with the exception of the Sound Technicians, with respect to Schedule B did receive their 10% increase? A. I have not went over all of the contracts of the individual locals and I couldn't answer that.
>
> Q. Do you know of any that didn't receive a 10% increase except for the Schedule B employees of the Sound Technicians? A. No, I do not."

Mr. Walsh for many years has been president of defendant International; for many years he has been the prime negotiator in behalf of all of the locals affiliated with the International. Not only was there a complete accord and conclusion as to wages, to be generally applied, and indiscriminately so, to each and every classification of every local union affiliated with the defendant International, but the intent and verity thereof becomes proof positive when it is realized that:

(a) The Memorandum Agreement [Clk. Tr. p. 41] is complete, except for language.

(b) It provides at page 1 thereof as follows:

"1. *General Wage Increases.*

(a) 10% general increase commencing as of January 31, 1961.

(b) An additional 5% increase commencing February 1, 1963.

2. *Term of Agreement.*

The term of this agreement shall be for a period of 4 years commencing with January 31, 1961, and extending to and including January 31, 1965."

(c) It provided for an increase in the contributions to the Health and Welfare Plan [Clk. Tr. p. 42].

(d) It provided for an increase in the contributions to the Pension Plan [Clk. Tr. p. 42].

(e) It provides [Clk. Tr. p. 44] as follows:

"4. The following I.A.T.S.E. local unions only, shall have the option, exercisable on or before March 1, 1961, to elect to retain the Golden Hour (excessive hours) provisions of its 1959 agreement in their entirety, in lieu of accepting the change referred to in this Paragraph 8:

776;
659;
728;
80; and
683"

(f) It provided for changes applicable only to "on" production employees, with respect to meal periods and meals [Clk. Tr. p. 45].

(g) It provided for a different method of computing payment for holidays not worked [Clk. Tr. p. 46].

(h) It provided for a change in the pay to "on call" employees [Clk. Tr. p. 47].

(i) It provided for work calls and change in the vacation with pay [Clk. Tr. pp. 47, 48].

(j) It provided for severance pay procedures [Clk. Tr. p. 48].

(k) It provided for the applicability of the contract to be placed in Drivers #399 Agreement [Clk. Tr. p. 50].

(l) And in conclusion, it provided as follows, including the signature of the official representatives of the defendant Association, defendant Alliance, defendant International, and the basic crafts, and another signature for a representative of other crafts not affiliated with defendant International [Clk. Tr. p. 51];

> "This memorandum is not in final contract language. A formal agreement shall be drafted between the parties, as soon as possible.
>
> "The respective member companies of the Association of Motion Picture Producers, Inc.
> By /s/ Charles Boren
>
> "I.A.T.S.E. and Its Locals
> By /s/ Richard F. Walsh
>
> "The respective member companies of the Alliance of Television Film Producers, Inc.
> By /s/ Richard W. Jencks
>
> "Basic Crafts (including Local #399, Culinary, Local #40, Local #278, Local #724 and Local #755)"
> By /s/ Ralph H. Clare"

In short, it provided for substantive and specific wage changes, benefit changes, and called special attention to those locals which were to receive a different application on certain conditions, by naming and enumerating those locals within the body of the Memorandum.

There was *no* reservation or exclusion for any purpose of defendant Local 695.

There is no question, as a matter of fact or law, that the Memorandum Agreement of 1961 applied to all classifications of defendant Local 695, including plaintiffs-

appellants, and that such plaintiffs have been improperly deprived of their vested wage rights.

In the Spring of 1961, the Official Bulletin of the I.A.T.S.E., defendant International, was published under No. 248, and at page 5 thereof, the defendant International wrote as follows: [Pltf. Ex. 1, Rep. Tr. p. 83, lines 16-22]

> "The new pact is for 4 years, with an immediate 10% wage increase to be followed by another 5% at the start of the second 2 years."

This Bulletin is distributed to all of the membership of the defendant International, including plaintiffs, and nowhere in said Bulletin does there appear any exceptions to such general ten (10%) per cent increase.

Mr. Walsh further testified [Rep. Tr. p. 84, lines 10-17], that in the general negotiations participated in by him from time to time, since he was the International President, a wage increase in percentage or in money was always finally accepted by all of the locals.

The testimony of Mr. Walsh clearly established that he had no knowledge of a meeting called by defendant Local 965 on February 6, 1961, nor did he receive a copy of a ballot purportedly utilized at said meeting, or thereafter [Rep. Tr. p. 95, lines 18-26]. There was a meeting in New York between defendant Carman and defendant Walsh after February 6, 1961, and Mr. Carman never told Mr. Walsh that he was presenting the membership with a change in the wage scale of the Memorandum Agreement, nor did he discuss the matter with Mr. Walsh or that he had submitted, prior to the signing of the Memorandum Agreement, a change in the general terms and conditions of the pay increases to the membership nor to the Board of Directors of de-

fendant Local 695, nor did Mr. Walsh know whether the purported agreement, locally entered into between defendant 695 and the respondent companies, was ever submitted to the Local for ratification [Rep. Tr. pp. 106-109, line 26].

Significantly, it was stipulated that Mr. Fairbanks, a representative of the defendant International, by letter of February 3, 1961, on the stationery of the International sent to all of the independent producers, a copy of the Memorandum Agreement of 1961, and stated in the letter [Rep. Tr. pp. 991, 997; Pltf. Ex. 10, p. 999], as follows:

> "This is to advise you that in accordance with the basic agreement with the I.A.T.S.E. and M.P.M.O. and as a result of negotiations as provided for therein, agreements were reached January 30, 1961, effective January 31, 1961, between the respective members of the Association of Motion Picture Producers, Inc., the Alliance of Television Film Producers, Inc., and the Film Processors' Council, as well as Technicolor Motor Picture Corporation, and the I.A.T.S.E. and M.P.M.O. and its studio locals, providing for changes as listed herewith.
>
> "In addition to these changes, there are some other minor changes in the various local contracts, and information pertaining to these can be furnished by the respective local unions."
>
> "Since your company is a party to the 'Independent Motion Picture Industry Employer and I.A.T.S.E. and M.P.M.O. Standard Basic Agreement', and in accordance with that agreement, we advise that you be prepared to meet

the wages, conditions and effective dates as outlined in this communication.

"The I.A.T.S.E. Locals are presenting these changes to their members for ratification, and in the event that any locals should fail to ratify them, the International Alliance will inform you by mail in the near future.

Sincerely yours,
(d) Zeal Fairbanks
International Representative"

We are appending hereto an Application and Declaration of Counsel for the appellants, addressed to the District Court of Appeal and to the Supreme Court of the State of California, with respect to another letter sent by Zeal Fairbanks on January 8, 1963, covering the 5% increase, utilizing the same procedure; as the Declaration indicates, this could not be introduced at the trial, since the chronology is apparent. The Application-Declaration is marked Exhibit "A", and a true and correct copy is attached as Exhibit "B" (Appendix pages 1 and 2). This is specific evidence, introduced by way of the defendant International's representative, and certainly cannot be ignored.

Mr. Charles Boren, the Executive Vice-President of the defendant Association, on cross-examination testified that the local negotiations continued on into January of 1961, to approximately January 27, 1961. There were pro and con arguments on both sides; defendant Local 695 had asked for the elimination of Schedule "C", and the producers refused to eliminate it [Rep. Tr. pp. 1001, 1002 to line 16]. In fact, it is undisputed that any and all of the local negotiations, discussions thereon, and results thereon, were concluded,

incorporated, and merged in the Memorandum Agreement of 1961.

Mr. Boren specifically stated that no statement, with respect to the negotiations, would be given unless it was a joint statement to the press [Rep. Tr. p. 1019, lines 8-12].

Mr. Boren did testify, however, that a joint statement was given to the Daily Variety and to the Hollywood Reporter, under date of January 31, 1961, so that in fact, these newspapers reflected the statements given to them by Mr. Boren of defendant Association, and by Mr. Walsh of defendant International for, and in behalf of, all of the negotiators, and was the official position and statement of the parties [Pltf. Exs. 3 and 4; Rep. Tr. pp. 131, 132].

Plaintiffs' Exhibit 3, the Daily Variety, dated January 31, 1961, contained [Rep. Tr. p. 1019, lines 12-23], a left-hand top column with a banner, "IA Gets 9 Pct. Cut of Post-'60 Pix To Freevee, 4-Year Deal Provides 10% Pay Tilt."

In Plaintiffs' Exhibit 4 [Rep. Tr. p. 132], the following appears: (Banner) "4-Year Pack Is Signed By IATSE—10% Hike First Two Years; 5% More in Second Half; Pay-TV Part of Theatrical."

> "Final agreement was formalized yesterday by representatives of the IATSE and basic craft studio unions with the AMPP and Alliance of Television Film Producers groups on a new collective bargaining pact. The contract, running for four years starting today provides for a 10% wage increase for the initial two years and an added 5% for the second half."

It is unmistakably clear that all classifications, and all wage schedules and all members who were working for all of the defendant respondents, had been given to them and they had a vested interest therein, a general wage increase effective as of January 31, 1961.

The denial to the Schedule "B" Sound Technicians of this wage increase was improper and in violation of the facts in this case, and of the law.

Defendant Carman, called under C.C.P. 2055, as an adverse witness, testified:

(a) That defendant Local 695 and the Producers (defendant respondents), negotiated on a local basis, commencing November 27, 1960 until January 29, 1961 [Rep. Tr. p. 693, lines 14-23].

(b) There was no contract in writing entered into as a result of the local negotiations, prior to the execution of the Memorandum Agreement of 1961 [Rep. Tr. p. 694, lines 15-21].

(c) During the general negotiations, the parties entered general discussions, presenting their respective positions and economic data in support thereof, and all matters were thoroughly ventilated [Rep. Tr. p. 698, line 8, to p. 700, line 26].

(d) A notice was sent by defendant Carman, presumably to all members of Local 695, noticing a meeting for February 6, 1961. Mr. Carman wrote the card, and on the card there appeared the language, "This is of great importance to the six weekly schedule." [Pltf. Ex. 7, postcard notice; Rep. Tr. p. 704, lines 6-21].

Of course, the six weekly schedule is Schedule "C."

It is clear from the record, that no notice was given to the membership with respect to the February 6, 1961, meeting except by Plaintiffs' Exhibit 7, said post-card notice, which did not refer to the meeting being important to Schedule "B" employees, working on the weekly minimum guarantee schedule, and which made *no* reference to the fact that, for the first time the membership would be confronted with an attempt to change the actual general wage increase, secured for all locals of defendant International, and for all classifications of said locals, with no variation thereon.

Accordingly, we submit that the attempt to change the negotiated and concluded wage agreement expressly set forth in the Memorandum Agreement of 1961, was improper, was without proper legal notice, and was in deprivation of the vested rights of the approximately 350 members of the defendant Local 695, *i.e.* the plaintiffs in this matter, who were, and are, in fact, not only the third party beneficiaries, but principals.

At the membership meeting of February 6, 1961, for the first time, there was distributed a document or pamphlet prepared by defendant Carman, and purporting to present to the membership a choice of accepting the ten (10%) per cent general wage increase, or denying the ten (10%) per cent wage increase to the plaintiffs, those working under Schedule "B," and adding said ten (10%) per cent to the ten (10%) per cent already given to the members of the defendant Local 695 working under the "C" Schedule [Pltf. Ex. 5, which is the pamphlet; Rep. Tr. p. 704, line 21, to p. 707, line 7; p. 708, lines 1-8].

It is rather significant that the Plaintiffs' Exhibit 5 was prepared by defendant Carman and the representative of the defendant Association.

It, also, is strange that, prior to the meeting of February 6, 1961, no documents, similar or identical with Plaintiffs' Exhibit 5, were distributed to the membership, and the membership was visited with a document for the first time at the meeting of February 6, 1961 [Rep. Tr. pp. 708, 709, 710, 711, lines 1-11].

It is interesting to note that in the examination of defendant Carman [Rep. Tr. p. 741, lines 13-18], he stated as follows:

> "Q. Did you ever, prior to February 6, 1961, in any way, oral or written, request that the members of the union working in the classifications Y-1 to -9 on a 'B' Schedule vote separately on your proposal? A. *No, sir.*" (Emphasis ours).

Defendant Carman also testified that Plaintiffs' Exhibit 5, which were the two proposals, were not discussed with defendant Walsh, and, in fact, from January 31, 1961, to the time that defendant Carman returned to Los Angeles, in March of 1961, there was no correspondence or telephone conversations on the entire matter between defendant Carman and defendant Walsh [Rep. Tr. p. 750, line 12, to p. 751, line 1].

Incidentally, defendant Carman confirmed the fact that defendant Local 695 was incorporated under the laws of the State of California [Rep. Tr. p. 703, line 26, to p. 704, line 6].

The meeting of February 6, 1961, by admission of all of the witnesses on both sides, took place without any knowledge being communicated to the plaintiffs

that a different proposal other than the proposal published in the "Official Publicity" [Pltf. Exs. 3 and 4; Rep. Tr. p. 1019, lines 12-23; p. 132], was to be presented to the membership.

Defendant Carman, in concert with the remaining defendant respondents herein, decided to take away the ten (10%) per cent granted generally by the Memorandum Agreement of 1961, from plaintiffs working under Schedule "B" [Rep. Tr. pp. 716, 717, 718, 719, 720, lines 1-22]. Plaintiffs' Exhibit 9, the alleged booklet entitled "Schedule of Wages and Conditions" [Rep. Tr. p. 755, lines 1-8] was, in fact, *never ratified.*

The first meeting of defendant Local 695, after February 6, 1961, adjourned for want of a quorum [Rep. Tr. p. 755, lines 14-18].

Defendant Carman had no authorization by the Board of Directors of defendant Local 695 with respect to the meeting of May 4, 1961, to sign a contract with the Producers [Rep. Tr. p. 900, lines 1-15].

The testimony of all of the witnesses, without attempting to detail the same, uniformedly was to the effect that the alleged contract between the defendant Local 695 and the defendants herein, contained wages other than that concluded in the Memorandum Agreement of 1961 and was never ratified by the membership.

As an exemplar with respect to this matter, may we advert to the testimony of plaintiff Denzil Daniels, as follows:

(a) That prior to the meeting of February 6, 1961, he did not know that there would be presented a pro-

posal such as contained in Plaintiffs' Exhibit 5 [Rep. Tr. p. 257, lines 7-13].

(b) That Mr. Daniels did not receive any information with respect to voting on alternate proposals [Rep. Tr. p. 257, lines 13-21].

(c) That there was no vote taken with respect to Plaintiffs' Exhibit 5 containing alternate proposals in the meeting of February 6, 1961 [Rep. Tr. p. 259, lines 4-10].

(d) That there were approximately three (3) meetings of the membership subsequent to the February 6, 1961 meeting [Rep. Tr. p. 261, line 25, to p. 262, line 3].

(e) That there was a meeting held sometime in July of 1961, but there was not a quorum [Rep. Tr. p. 262, lines 3-13].

(f) That the next meeting took place in October of 1961, and Mr. Daniels testified as follows:

> "Q. How many were present at that time, approximately? A. Well, we stood outside quite some little time until we got a quorum and then we did have a quorum. I would say we had fewer than 200.
>
> Q. At that meeting, can you tell us whether Mr. Carman or any other official of the union presented to the membership then gathered International Alliance Exhibit C, which bears a legend, 'Agreement of January 31, 1961 between Producer and I.A.T.S.E. and M.P.M.C. and Local 695 thereof for either approval or ratification.' A. *This contract has never been submitted to the membership for ratification at a meeting*" (Emphasis ours).

The testimony of all of the witnesses, for plaintiffs or defendants, corroborated Mr. Daniels, and stated and admitted that defendant International's Exhibit C allegedly the agreement of January 1, 1961, between the Producer and defendant Local 695, had never been submitted to the membership for ratification at a meeting.

Defendant Producer's Exhibits "A", "B", "C", "D", "E", "F", and "G" [Rep. Tr. pp. 764, 765, 766, 770, 776 and 777], which are the demands of defendant Local 695 during the negotiations of 1960, 1959, 1955, 1953, 1951, 1947 and 1946, contain no written demands requesting allocation of wage increases from one classification to another [Rep. Tr. p. 895, lines 10-20].

In 1959 and in 1955, the hourly wage increases granted in general negotiations were paid to, and received by, every one of the classification of Local 695, and no moneys or increases were taken from any of the classifications working under any of the schedules, and allocated to those working under a different schedule [Rep. Tr. pp. 906, 907, 908, lines 1-19].

Defendant Carman signed defendant Alliance's Exhibit H [Rep. Tr. p. 803], which allegedly certified that the wage increase and wage scales contained in the Memorandum Agreement of 1961 embodied and represent the Agreement made between I.A.T.S.E. and duly approved and ratified by vote of the membership of Local 695 with respect to the allocation of wages provided for therein [Rep. Tr. p. 904, lines 10-18].

However, on cross-examination, defendant Carman admitted that there is nothing in the Memorandum Agreement of 1961 that allocates the general wage increases provided for in Paragraph 1, page 1 of said Memorandum [Rep. Tr. p. 904, line 7, to p. 905, line 8].

It is urged that under all of the facts in this case, there was no ratification of defendant International's Exhibit "C", and that there existed a clear cut and uncontradictory combination among the respondents herein, to deprive plaintiffs, in violation of the facts, and of the law, of their ten (10%) per cent increase.

It must be remembered that the Memorandum Agreement of 1961 generally negotiated for all of the affiliated Unions of defendant International, was ratified by being effectuated by all of the 22 to 24 Locals affiliated with the defendant International, and was effectuated by actual payments of said ten (10%) per cent increase, since January, 1961, without qualification to each and every Local so affiliated, to each and every classification of said Locals, and to each and every wage schedule of said classification, with the only, and flagrantly violative exception of plaintiffs, working under Schedule B.

Hence, this Petition for Writ of Certiorari should be granted.

VII.

SUMMARY OF ISSUES INVOLVED.

1. Did the Trial Court, and thereby the Opinion of the District Court of Appeal, and thereby the denial of a hearing by the Supreme Court of the Sate of California, substantially and materially err in rendering an affirming judgment for defendants and respondents, in view of the entire record of this case, in contradiction of the Trial Court's Findings of Fact 2, 3, 17, 28, 33, 34 and 36, and in contradiction of the Trial Court's Conclusions of Law 2, 3, and 5 [Clk. Tr. Findings of Fact, p. 397; Conclusions of Law p. 431], and

further, did the Trial Court in its judgment substantially err in that the Findings of Fact 18, 19, 20, 21, 22, 24, 27, 29, 30, 31, 32, 35, 37, 38, 39, 40 to 52 inclusive, and 55 to 59 inclusive, are not supported by the substantial evidence, are in contradiction of the weight of the evidence and the applicable law and fundamentally contravene the constitutional proscription of the Constitution of the United States, Article I, Section 10, cl. 1 with respect to the impairment of contracts.

2. Did the Trial Court in said erroneous Findings of Fact, Conclusions of Law and Judgment in favor of defendants and respondents and against plaintiffs, appellants and petitioners, and the District Court of Appeal by its Opinion, and the Supreme Court of the State of California by the denial of a hearing create a miscarriage of justice and a fundamental violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and by extrapolation of the Fourteenth Amendment, violate Article I, sections 9 and 13 of the Constitution of the State of California.

3. Did the District Court of Appeal in its Opinion, and the Supreme Court of the State of California by affirmance in its denial of a hearing, fundamentally and materially, both by omissions and inaccurate conclusions affect the fundamental rights of plaintiffs, appellants and petitioners in violation of Article I, Section 10, cl. 1, and the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and by extrapolation Article I, Sections 9 and 13 of the Constitution of the State of California.

4. Did the Trial Court, the District Court of Appeal in its Opinion, and the Supreme Court of the State

of California in denial of a hearing, violate the fundamental rights of the plaintiffs, appellants and petitioners herein as protected under Section 9a of the Labor Management Relations Act of 1947, as Amended (June 23, 1947, c. 121, Title 1, Section 101, 61 Stat. 143; 29 U.S.C. Section 159).

VIII.

ARGUMENT.

1. **Did the Trial Court, and Thereby the Opinion of the Opinion of the District Court of Appeal, and Thereby the Denial of a Hearing by the Supreme Court of the State of California, Substantially and Materially Err in Rendering an Affirming Judgment for Defendants and Respondents, in View of the Entire Record of This Case, in Contradiction of the Trial Court's Findings of Fact 2, 3, 17, 28, 33, 34 and 36, and in Contradiction of the Trial Court's Conclusions of Law 2, 3 and 5 [Clk. Tr. Findings of Fact p. 397; Conclusions of Law p. 431], and Further Did the Trial Court in Its Judgment Substantially Err in That the Findings of Fact 18, 19, 20, 21, 22, 24, 27, 29, 30, 31, 32, 35, 37, 38, 39, 40 to 42 Inclusive, and 55 to 59 Inclusive, Are Not Supported by the Substantial Evidence, and Are in Contradiction of the Weight of the Evidence and the Applicable Law and Fundamentally Contravene the Constitutional Proscription of the Constitution of the United States, Article I, Section 10, Cl. 1, With Respect to the Impairment of Contracts.**

This case is expressly predicated on the contractual obligations of these defendant respondents with respect

to the beneficial and beneficiary interests of the named plaintiffs and the class of employees and members of nonprofit corporate defendant Local 695, similarly situated.

The Trial Court in its Findings of Fact and Conclusions of Law reached, what may be termed an ambivalent result.

From the evidence, the Trial Court recognized the Memorandum Agreement of 1961, and the fact that it was the result of long negotiations, and that it was executed *after* all local 695.

The Trial Court fundamentally erred in attributing ambigutity to the clear, unequivocal provisions of Section 1, page 1 of said Memorandum Agreement of 1961.

This provided for a wage increase of ten (10%) per cent.

There were no contradictions to this.

The testimony of Mr. Walsh admitted its general application.

The testimony of Mr. Charles Boren admitted the general wage increase.

The then current issues of "Variety" and the "Hollywood Reporter", the depositary of the official news broadcast by Mr. Boren [Pltf. Exs. 3 and 5], published and disseminated the general increase of ten (10%) per cent.

The letter of Mr. Zeal Fairbanks, an International Representative, under date of February 2, 1961 [Pltf. Ex. 10; Rep. Tr. p. 999], containing a copy of the Memorandum Agreement of 1961, was sent to the Independents, also admitted the conclusion of the negotia-

tions, and the ten (10%) per cent general wage increase across the board.

The Trial Court, as a matter of law, should have enforced Section 1, page 1 of the Memorandum Agreement of 1961, and granted the remedies prayed for to plantiffs.

The Trial Court ignored all of the testimony which clearly established that the substantive agreement as to wages was concluded in the Memorandum Agreement of 1961; that the ten (10%) per cent increase was effective as of January, 1961; that the increase was applied uniformedly to each local, to each classification, to each employee working under each wage schedule of each classification, with the sole and illegal exception and exclusion of plaintiffs working under Schedule B.

The Trial Court ignored the inclusion in said Memorandum Agreement of 1961 of substantial variations with respect to Locals specifically enumerated therein.

Finally, at the conclusion of the Memorandum Agreement of 1961, quoted above, and signed by all of the representatives involved; that is, the representatives of defendant Association, the representatives of defendant Alliance, the representatives of defendant International and of the Locals affiliated, and the representatives of other Crafts unaffiliated with the defendant International; there remained only drafting, which was only a matter of legal language, and not one of substance.

The Trial Court ignored Plaintiffs' Exhibit 10, the letter of Mr. Zeal Fairbanks under date of February 2, 1961, which required adherence to the Memorandum Agreement of 1961, with the exception of "minor" changes. The taking away of a ten (10%) per cent in-

crease from an employee, or a group of employees, without their consent, is *not* a minor change.

The Trial Court blatantly erred in its Findings of Fact that the Memorandum Agreement of 1961 was not a complete document with respect to the wage increases, and was, in its opinion, unratified.

The effectuation of that document, Memorandum Agreement of 1961, by giving each and every employee of each and every Local Union a ten (10%) per cent increase, effective as of January, 1961, with the exception of the plaintiffs in this case, represents complete ratification and represents execution and performance of a contract.

The Trial Court's Findings of Fact that defendant International's Exhibit C, defendant Local 695's Agreement of 1961, as having been ratified is not only fundamental but reversible error.

Each and every witness, as the record discloses, and as set forth above under the statements of facts of this case, admitted and conceded that there never was a ratification of said defendant International's Exhibit C.

Was there a conspiracy?

Did the Producers benefit? Did they combine with the other defendant respondents in creating a divestiture of a ten (10%) per cent wage increase to which the plaintiffs were, and are, entitled. The Trial Court forgot or ignored, the testimony of Mr. Batchelder, a representative of defendant Association who testified as follows:

(a) There were no meetings from February 1, 2 and 3 to the period of February 6, 1961 and after February 6, 1961, between Mr. Carman, Mr. Boren and Mr.

Batchelder with respect to the allocation of a wage increase [Rep. Tr. p. 1255, line 26, to p. 1256, line 6];

(b) In fact, Mr. Batchelder testified that during no time in 1961 were there any meetings between himself, Mr. Boren and Mr. Carman with respect to the allocation of wage increases after February 6, 1961 [Rep. Tr. p. 1256, lines 12-17];

(c) The defendant Association, strangely, prepared defendant International's Exhibit H, the alleged two page certification [Rep. Tr. p. 1257, lines 5-15];

(d) In fact, Mr. Batchelder never knew, of his own knowledge, and that is strange, whether or not International's Exhibit C was ever presented to the membership in a meeting of Local 695 for a vote [Rep. Tr. p. 1257, lines 16-24];

(e) Mr. Batchelder testified that he did not have any written correspondence, prior to the general negotiations, between his office and the office of defendant Alliance, nor did he have any meetings, formal or informal, between himself, Mr. Boren, Mr. Jenks or any other representative of defendant Alliance [Rep. Tr. p. 1239, lines 1-25];

(f) Mr. Batchelder testified that there were caucuses between defendant Association and defendant Alliance and other representatives thereof, during the local negotiations [Rep. Tr. p. 1239, line 25, to p. 1240, line 8].

Mr. Batchelder further testified that between sometime in November of 1960 and January 5, 1961, there was no caucus with respect to the Local negotiations; similarly, between January 5, 1961, and including January 28, 1961, there were no meetings or caucuses with

respect to Local negotiations [Rep. Tr. p. 1240, lines 8-20];

(g) There were no discussions with respect to the elimination of Schedule C at the caucuses; similarly, during the negotiating meeting itself, local or general, after January 5, 1961, there were no discussions that the ten (10%) per cent wage increase would *not* be given to those members working under Schedule B [Rep. Tr. p. 1242, line 8, to p. 1243, line 6];

(h) That there were no discussions at subsequent caucuses or meetings among the employer group during the negotiations after January 5, 1961, with respect to the elimination of the C Schedule [Rep. Tr. p. 1243, lines 6-26].

This would apply also up to and including the meeting of January 28, 1961 [Rep. Tr. p. 1244, lines 1-6].

(i) Also, during the general negotiations of 1961, there were caucuses or meetings during these negotiations between employer groups; however, there were no discussions among the employer group in caucus with respect to the fact that a wage increase of ten (10%) per cent, or of any amount, would not be given to members of Local 695 working under Schedule B [Rep. Tr. p. 1244, lines 6-23];

(j) Mr. Batchelder never saw Plaintiffs' Exhibit 7 before it was presented to him at the trial; there were no minutes taken of the general negotiations or local negotiations; Mr. Batchelder actually computed the Plaintiffs' Exhibit 5 marked "Proposed vs Present Wage Scale" [Rep. Tr. p. 1249, line 13, to p. 1250, line 15].

There was no testimony, proper and admissible, which in any way establishes that said defendant International's Exhibit C was ever ratified; in fact, contrariwise, there is evidence, as discussed above, that the defendant Association together with representatives of defendant Local 695 met in concert, without the knowledge of the membership and attempted to take away from the membership the 10% increase which already had been agreed to, signed for by all of the representatives and vested as a matter of right in the membership. It is rather *non sequitur* for the Trial Court, in its Findings of Fact, to consider the language in Section 1, page 1 of the Memorandum Agreement of 1961 ambiguous.

The American College dictionary's definition of the word "general" states:

> "pertaining to, affecting including, or participated in by *all* members of a class or group; not restricted to one class or field; the general practice, with respect to the whole class referred to, universal, common, shared by all."

The Labor Management Relations Act, Section 9a, specifically provides for the protection of minority members or non-members of a Union, with respect to collective bargaining.

If that Section has any meaning, the indiscriminate right of amendment after a contract is concluded as to wages would be violative of Section 9a. There is a basis for recognizing the good faith bargaining power of the representatives of a Union or International.

But where an International does negotiate and does conclude fixed wages, to attempt to take it away by the simple process of majority rule would clearly contra-

vene the extrapolation of the Fourteenth Amendment as pronounced by this Honorable Court since the *Brown* and companion cases in 1954 up to and including the recent enactment of the Civil Rights Statute and the Voting Rights Act; there is clear concern both by legislation and the courts with the rights of minorities since too often and too easily those rights have been swept asunder by the mere act of a majority.

To secure the subjective desire of a leadership of a Union or International is too difficult to determine so as to prevent an objective act or divestiture of wages which can be easily accomplished when no right of amendment is implicit, inherent or expressly contained within the document, upon which there is a conclusion with respect to the wages granted. Moreover, the entire program, irrespective of the affirmative or negative possibilities thereof, by the Labor Management Relations Act, 1947, as Amended, and the Labor Management Reporting and Disclosure Act of 1959, as Amended, proclaims a skein to protect the individual not to ensnare him or them because they represent a minority. The Memorandum Agreement, heretofore referred to, represents the obligations of a valid contract and no alleged subsequent amendment can take away the rights granted to petitioners herein, first with respect to their ten percent general increase, and second with respect to their five percent general increase.

In *Bochino v. Palmer,* Misc. 2d (1960), 203 N.Y.S. 2d 301, it was held that no action on the part of a state or subdivision thereof (state courts are subdivisions thereof) may impair the obligation of a specific contract.

In *East N. Y. Sav. Bank v. Hahn* (N.Y. 1945), 66 S. Ct. 69, 326 U.S. 230, 90 L. Ed. 34, 16 A.L.R. 1279, the court held that the protective power of the state to safeguard vital interest of its people may be treated as an implied condition of every contract and as such, as much part of the contract as though it were written into it, whereby state's exercise of its power enforces and *does not impair a contract* (emphasis ours).

While generally the judgment of courts, which constitute arms of the state government, will not be interfered with as an impairment of the obligation of contract, judicial decisions which expressly or by necessary implication give effect to an impairment of the obligation of contract, in contravention of existing state or federal law, are proscribed by Article I of the Constitution of the United States, Section 10, cl. 1 thereof.

In the case of *Peevyhouse v. Garland Land Min. Co.* (Okla. 1963), 382 P. 2d 109, Cert. denied, 84 S. Ct. 196, 375 U.S. 906, 11 L. Ed. 2d 145, the case held that the Supreme Court's decision did not impair obligation of contract where the decision did not overrule prior holdings of the Supreme Court, but the court therein did state that the clause forbidding impairment of contract relates to legislative action and not to judicial decisions of state court, *where decisions of state court do not expressly or by necessary implication give effect to subsequent state law whereby obligation of contract is impaired* (emphasis ours).

In the instant matter, it is clear that the Superior Court, Supreme Court of California and the District Court of Appeal did destroy the collective bargaining fruits in the form of a general wage increase granted to

petitioners by said Memorandum of Agreement, duly executed and completed after final negotiations; the general negotiations were commenced before any local discussions, and were concluded after all of the local arguments with respect to the special desires of any local Union.

Ergo, the divestiture represented and now represents an impairment of the obligation to contract and requires that the Petition for Writ of Certiorari be granted and a reversal.

2. **Did the Trial Court in Said Erroneous Findings of Fact, Conclusions of Law and Judgment in Favor of Defendants and Respondents and Against Plaintiffs, Appellants and Petitioners, and the District Court of Appeal by Its Opinion, and the Supreme Court of the State of California by the Denial of a Hearing Create a Miscarriage of Justice and a Fundamental Violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and by Extrapolation of the Fourteenth Amendment, Violate Article I, Sections 9 and 13 of the Constitution of the State of California.**

The crux of this case is whether a majority of a Union, together with employers, through the elected officials, may, after a clear accord has been reached and signed on the exact percentage of wage increase, take away the vested interests, the wage increases, or property of a minority by the simple expediency of out voting them.

The United States Supreme Court, in the case of *International Association of Machinists v. Street*, 367

U.S. 740, at 761, 81 S. Ct. 1784 at 1796 (1961), stated, in effect, *that this cannot be done.*

The Court stated:

> "Moreover, this Court has held that under the statutory scheme, a union's status as exclusive bargaining representative carries with it *the duty fairly and equitably to represent all employees of the craft or class, union and nonunion. Steele v. Louisville & N.R. Co.,* 323 U.S. 192, 65 S.Ct. 226; *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen,* 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187" (Emphasis added).

In the *Street* case, *supra,* the fact that moneys had been paid to the Union by members who protested the diversion of such funds for political purposes, contrary to the belief of objecting members or non-members paying such funds, caused the United States Supreme Court to find that such diversion of funds would be in effect a violation of the First and Fifth Amendments of the United States Constitution, and a violation, therefore, of the Fourteenth Amendment of the Constitution of the United States.

In the instant matter, plaintiff appellants paid membership dues for many years, and expected that their collective bargaining representatives would deal with them fairly and give to them the same increases secured for everyone else; particularly, when the representatives signed their names to the Memorandum Agreement of 1961, and published the fact in the trade papers and in the official bulletin of the International.

The United States Supreme Court has said that you may not take away the property of a member as

reprsented in the form of money or dues, and convert it for a purpose contrary to his desires or rights, and in the instant matter, divert it by expenditures for collective bargaining which result in a discrimination against him (plaintiffs).

In essence, the *Street* case, *supra,* is the first case of its kind which speaks distinctly on the issue of divesting a third party beneficiary from a vested interest, merely because the majority so votes.

In the present case, the general increase was to be applied to all of the Locals of the International, including the Sound Technicians and including the employees working under Schedule B; there were no distinctions.

Hence, the ten (10%) per cent increase vested.

To take it from the plaintiffs (a minority) and add the increase to the majority represents an improper action, in violation of the decision of the United States Supreme Court.

The plaintiffs pay their membership dues continuously, and were entitled to rely on, and did rely on, the alleged good faith collective bargaining of their representatives in the general negotiations, did rely upon their promises and their written agreement with respect to the indiscriminate general ten (10%) per cent wage increase as incorporated in the Memorandum Agreement of 1961, and as signed by said representatives.

Plaintiffs relied, and were assured [Pltf. Exs. 3 and 4; Rep. Tr. pp. 130, 132] by the official publicity that the ten (10%) per cent increase was a general increase and *they,* the plaintiffs, would receive it effective January, 1961.

Plaintiffs similarly relied on the official statement of defendant International in the Spring issue of 1961 that the ten (10%) per cent was a general wage increase, without exceptions or qualifications [Pltf. Ex. 1; Rep. Tr. p. 83].

Plaintiffs relied on good faith negotiations of all defendant respondents who participated in said general negotiations, and who executed the Memorandum Agreement of 1961 [Deft. International's Ex. 1; Rep. Tr. p. 51].

The plaintiffs relied on the fact that the wage increases in said Memorandum Agreement of 1961 were paid *to all* locals, to all classifications, to all employees working under each and every *Wage Schedule*. They were stunned to learn that their 10% wage increase was to be taken away.

In short, the Memorandum Agreement of 1961 was executed, purportedly to represent the result of good faith negotiations of defendant respondents, was performed, was effectuated, and represented, *in fact,* ratification of said Memorandum Agreement by all parties, and *defendant respondents were promissorily estopped from denying it.*

The basic Agreement of 1961 [Deft. International's Ex. B, Rep. Tr. p. 52] contains the specific substantive provisions of the Memorandum Agreement of 1961, except as to finality of legal language, and except as to the wage scales, since the wage levels of all the Unions affiliated with defendant International were different.

The Trial Court either ignored this fact or did not appreciate it with clarity. This procedure was historical.

That was why, there was sent out, under the aegis of defendant International the letter dated February 2, 1961 [Pltf. Ex. 10, Rep. Tr. p. 999].

Each and every one of the twenty-two (22) Unions, in their Local Agreement contained the general wage increase. There is no contradiction in the record with respect to this.

The Agreement of January 31, 1961, defendant Local 695's purported Agreement [Deft. International's Ex. C, Rep. Tr. p. 56] was the only one which excluded the ten (10%) per cent wage increase for all classifications and for all wage schedules.

Perhaps this is the reason said Defendant International's Exhibit C *was never ratified by the membership,* and represented with respect to the diversion of said ten (10%) per cent increase, and does represent, an illegal bargaining "abortion".

It is a lame excuse to say that the Memorandum Agreement of 1961 was not final as to the general wage increases, even though it was signed.

Historically, Unions have, with respect to Industry, dealt with what is known as "short form" agreements which often refer to the Master agreement.

This was recognized in the case of *N.L.R.B. v. International Hod Carriers, etc.,* U.S.C.A. 9th (1961), 287 F. 2d 605. At 608, the Court stated:

> "The Union asserts that this contract is a 'short form' agreement which incorporates, and continues to incorporate during its existence, the current master contract which the Building and Construction Trades Councils have with the Associated Gen-

eral Contractors (AGC), a bargaining association of employers. The agreement itself is absolutely silent as to the existence or incorporation of such a master contract, and to attempt to enlarge its terms by parol testimony would be a violation of the parol evidence rule. However, the agreement does refer to 'the wage scales, classifications and working rules of the Union having jurisdiction', and 'the requirements of the Council and its affiliated Unions for clearing workmen to the job', and it appears that respondent's wage scales, working rules and clearing requirements are those set out in the AGC contracts, including a requirement that employers hire new laborers through respondent's hiring hall."

The defendant respondents are promissorily estopped from denying the efficacy and indiscriminate application of the general wage increase of the Memorandum Agreement of 1961.

In *Graddon v. Knight* (1956), 138 Cal. App. 2d 577, 292 P. 2d 632, at page 637, the Court stated:

"The evidence here was such that the jury could and did find all the elements necessary for the doctrine of promissory estoppel to apply, namely, (1) a promise clear and unambiguous in its terms, *National Dollar Stores v. Wagnon,* 97 Cal.App.2d 915, 219 Pac.2d 49; (2) reliance by the party to whom the promise is made, *Estate of Jackson,* 112 Cal. App.2d 16, 245 Pac.2d 684; (3) his reliance must be both reasonable and forseeable, *Pacific Finance Corp. v. Hendley,* 119 Cal.App. 697, 7 Pac.2d 391; *Restatement of Contracts, Section 90;* (4) the party asserting the estoppel must be injured by his reliance, *National Dollar Stores v. Wagnon,* supra."

The Memorandum Agreement of 1961 containing the ten (10%) per cent wage increase, and executed by the parties, was a promise which was clear and unambiguous; the promise, in effect, was made for the benefit of all the members of defendant International, including plaintiffs, who paid per capita tax to the International, and plaintiffs were entitled to rely upon such promises, and did so rely; certainly such reliance was reasonable and foreseeably represented a general wage increase; and certainly the deprivation of a ten (10%) per cent wage increase so that plaintiffs received no wage increase for a year, represented injury to plaintiffs; therefore, defendant respondents are estopped. All four elements are herein clearly applicable undr the doctrine of promissory estoppel.

The evidence in this case is sufficiently clear and abundant to establish the foregoing elements.

In the case of *H. J. Heinz Co. v. National Labor Relations Board,* 311 U.S. 514 (1941), at page 325, the Supreme Court said:

> "The freedom of the employer to refuse to make an agreement relates to its terms in matters of substance and not, once it is reached, to its expression in a signed contract, the absence of which, as experience has shown, tends to frustrate the end sought by the requirement for collective bargaining."

In the instant case, defendant respondents have the same legal obligation to put in effect the general wage increase of ten (10%) per cent as required of the employer in the *Heinz* case, *supra,* who reached an agreement on the basic substantive terms, but who refused to sign the agreement.

The testimony of James Thomson [Rep. Tr. p. 321, *et seq.*]; of Denzil Daniel [Rep. Tr. p. 235, *et seq.*]; of C. B. Robert [Rep. Tr. p. 576, *et seq.*]; of Woodruff Clarke [Rep. Tr. p. 113, *et seq.*]; named plaintiffs; of Allen Leonard Boyle, who orally authorized plaintiffs to represent him in this case [Rep. Tr. p. 680, lines 14-18, *et seq.*]; of Stephen J. Bass [Rep. Tr. p. 1302, *et seq.*]; of Arthur L. Dixon [Rep. Tr. p. 1172 *et seq.*]; and of practically all of the witnesses testifying directly for plaintiffs, clearly establishes that plaintiffs and those similarly situated have at least two (2) years prior to 1961, and thereafter, worked on Schedule B and *did not* receive the ten (10%) per cent wage increase; their deprivation was specifically the result of the common concert of all the defendant respondents.

The issues propounded by the plaintiffs and by the defendant respondents, while complex in comprehension, are clear and simple in approach.

They are:

1. There was a valid contract executed between the parties, culminating long negotiations.

2. The grant of a wage increase was clear, defined, and without condition or variation. The Producers and the Employers granted ten (10%) per cent wage increase to all classifications of all locals involved, retroactive to January 31, 1961, and five (5%) per cent effective as of February, 1963.

3. The pronunciamento of the President of the defendant International in the Bulletin of the International, proclaimed this increase without variation, modification or individuated application.

4. All of the twenty two (22) Unions involved of the I.A.T.S.E., with the exception of the defendant Local 695, with respect to the Schedule B employees, have received and are receiving the ten (10%) per cent wage increase.

It is the position of the plaintiffs that there is not only a violation of contract with respect to the payment of wages, but a violation of law, constitutionally, and a violation of the obligation of representation on the part of defendant International and defendant respondents with respect to their duty in indiscriminate and fair collective bargaining, after an accord has been reached, governing all employees involved.

5. As a result, all of the remedies requested in the Complaint are legally available and should be accorded to plaintiffs herein.

Plaintiffs shall now attempt to dispose of some of the remaining issues touched upon during the trial of this case:

(a) Neither preemption under Federal Law nor exhaustion of internal remedies under Union Law is involved in this case.

In *Charles Dowd Box Co. v. Courtney,* 82 S. Ct. 519, 368 U.S. 502 (1962), the Supreme Court states:

> "Section of Labor Management Relations Act providing that suits for violation of contracts between employer and labor organization representing employees in industry affecting commerce may be brought in federal District Court did not divest state court of jurisdiction over such suits. Labor Management Relations Act, 1947, Section 301(a), 29 U.S.C.A. Section 185(a)."

Moreover, this is abetted by the fact that this is a wage claim cognizable under the California Labor Code Sections 200-272, inclusive.

In *Oppenheimer v. Robinson,* 50 Cal. App. 2d 420 (1957) the Court recognized the right to sue for unpaid wages and statutory penalty.

In the instant case, the amount is easily ascertainable since as to each plaintiff named and as to each class, the ten (10%) per cent thereof (increase) which has not been paid can arithmetically be determined.

(b) This action is also against the employers, both on liability and conspiracy, and therefore does not involve exhaustion of internal remedies.

(c) Under the Corporation Code 9001, Local 695, being a non profit corporation, the plaintiffs are in a position of minority stockholders, and cannot discriminatorily be divested of either earnings, dividends or accretions by vote of the majority.

Division 1 of the Corporate Code relating to profit corporations pertains to nonprofit corporations.

Smith v. Taecker (1933), 133 Cal. App. 351, refers to dividends and each stockholder being entitled thereto.

(d) Under the California Labor Code Section 1126, bargaining agreements are specifically enforceable.

Levy v. Superior Court, 15 Cal. 2d 692.

> "A collective bargaining agreement between an employer and a labor organization is enforceable at law, or in equity, and a breach by any party is subject to the same remedies, including an injunctive relief, as are available in other contracts."

(e) California Code of Civil Procedure 382, provides, in part, as follows:

> ". . . and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all." (Enacted 1872) Derivation: Stats. 1851, c. 5. p. 52, Sec. 14.
>
> *City and County of San Francisco v. Market Street Ry. Co.,* 95 Cal. App. 2d 648, 213 P. 2d 780 (1950).

(f) Under California law, an employee may sue to recover for wages individually through the courts or through the statutory commission.

> *Division of Labor Law Enforcement v. Standard Coil Products,* 136 Cal. App. 2d 919, 288 P. 2d 637;
>
> *Division of Labor Law Enforcement v. Dennis,* 81 Cal. App. 2d 306, 182 P. 2d 932.

(g) The statutory obligation of collective bargaining representatives to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all those members, without hostility to any.

> Section 9(a) of the National Labor Relations Act 1947, as amended.

Hence, we submit, the Judgment of the Trial Court should be reversed.

3. **Did the District Court of Appeal in Its Opinion, and the Supreme Court of the State of California by Affirmance in Its Denial of a Hearing, Fundamentally and Materially, Both by Omissions and Inaccurate Conclusions Affect the Fundamental Rights of Plaintiffs, Appellants and Petitioners in Violation of Article I, Section 10, Cl. 1, and the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and by Extrapolation Article I, Sections 9 and 13 of the Constitution of the State of California.**

May we suggest that to all intents and purposes, within the State of California and probably throughout the United States, the specific issues and the specific facts involved in this case create a case of first impression. Moreover, it must be remembered—and this was completely ignored, unintentionally, in the Opinion of the District Court of Appeal, that the defendant Local 695 was and is a California, non-profit corporation and subject to the Corporation Code of the State of California, and that in the event of any conflict, the California Code and the California law prevails.

Under all of these circumstances, we respectfully submit that the Petition should be granted.

May we point out briefly the factual and legal errors in the Opinion of the District Court of Appeal, substantial and fundamental, contended by appellants to cause the granting of this Petition.

These omissions and incorrect statements are as follows:

1. The conjecture or hypothesis as set forth in the Opinion of the District Court of Appeal at pages 4, 5,

and 6 (Appendix) in affirming the Trial Court's Findings Nos. 27 and 28 are fatally in error.

The fact remains that the vast majority of the plaintiffs, during the time involved and continuing up to the present time, were employed on *Schedule "B"*.

Whether or not an employer could change their wage condition to *Schedule "A"* or *Schedule "C"* is not relevant, because these plaintiffs and appellants had fiscally taken away from them, in violation of a contract, a clear-cut, across-the-board 10% wage increase.

With due deference to the District Court of Appeal there was and is a complete failure to recognize the material facts wherein appellants were deprived of a 10% wage increase and where appellants in the great majority and continuously have been and are employed on a *"B" Schedule*. The record has been ignored with respect to this matter.

Whether or not an employer could change the wage schedule of these plaintiffs and appellants, the basic fact is that their wage schedules were not changed and had not been changed, and they are the ones that have been fiscally deprived of their wage increase. This is established in the record by the testimony of James Thomson [Rep. Tr. p. 321, *et seq.*]; of Denzil Daniel [Rep. Tr. p. 235]; of C. B. Robert [Rep. Tr. p. 576, *et seq.*]; of Woodruff Clarke [Rep. Tr. p. 113, *et seq.*]; named plaintiffs; of Allen Leonard Boyle, who orally authorized plaintiffs to represent him in this case [Rep. Tr. p. 680, lines 14-18, *et seq.*]; of Stephen J. Bass [Rep. Tr. p. 1302, *et seq.*]; of Arthur L. Dixon [Rep. Tr. p. 1172 *et seq.*]; and of practically all of the witnesses testifying directly for plaintiffs, clearly

establishes that plaintiffs and those similarly situated have at least two (2) years prior to 1961, and thereafter, worked on *Schedule B* and *did not* receive the ten (10%) per cent wage increase; their deprivation was specifically the result of the common concert of all the defendant respondents.

2. The District Court of Appeal failed to consider the testimony in the record with respect to the attempt to eliminate Schedules "C" and "D" as set forth in its Opinion on pages 6, 7 and 8.

The facts in the record clearly establish the following:

(a) All of the discussions with respect to the defendant Local 695 and with respect to the change of wage Schedules or elimination of Schedule "C" occurred approximately on January 3 or 4, 1961, and were concluded January 28, 1961, *after which* the Memorandum Agreement was prepared, executed and performed [Rep. Tr. p. 70, lines 16-22].

Prior to the meeting of February 6, 1961, of defendant Local 695, no documents similar or identical with Plaintiffs' Exhibit 5 were distributed to the membership, and the membership was visited with a document for the first time at the meeting of February 6, 961 [Rep. Tr. pp. 708, 709, 710, 711, lines 1-11].

At the meeting of February 6, 1961, the matter submitted to the membership was whether they voted or accepted a 10% general wage increase or denied the 10% wage increase to the plaintiffs, working under *Schedule "B"* so that the approximate 10% already given to those members working under Schedule "C" should have added thereto the 10% which justly should have gone to those working under *Schedule "B"* [Pltf. Ex. 5,

which is the pamphlet; Rep. Tr. p. 704, line 21, to p. 707, line 7; p. 708, lines 1-8].

What has been missed is that at the Local negotiations which were completed before the completion of the general negotiations, *no elimination* of Schedule "C" was accomplished; instead, discriminatorily, and in concert with the employers and defendants and respondents, the defendant Local 695, through its officers, combined to take away the wage raise agreed to in writing and one which was granted and given to approximately 22 Unions and 22,000 people with the exception of 350 or 400 involved herein.

We sincerely believe that the District Court of Appeal materially erred in omitting the facts with respect to these matters.

It is very strange that said court discusses as did the Trial Court the oral exchanges between Mr. Boren, representing the producers, and the representatives of the Local, but failed to take legal cognizance that there is and was not any ambiguity in the clear-cut, unequivocal language of the Memorandum Agreement [Clk. Tr. p. 41], which provided as follows:

"1. *General Wage Increases.*

(a) 10% general increase commencing as of January 31, 1961.

(b) An additional 5% increase commencing February 1, 1963.

"2. *Term of Agreement.*

The term of this agreement shall be for a period of 4 years commencing with January 31, 1961, and extending to and including January 31, 1965."

Further, and we must repeat, Mr. Walsh, the President of the International, while testifying that there were discussions with respect to doing away with Schedule "C" with employers of the Sound Technicians [Rep. Tr. p. 70, lines 3-11], stated that all of these discussions took place *prior to the execution of the Memorandum Agreement.*

The Memorandum Agreement provided for a 10% wage increase *without reservation,* commencing January 31, 1961. It provided for an additional 5% increase commencing February 1, 1963. It provided for a term of agreement for 4 years; it provided for an increase in the contributions to the Health and Welfare Plan [Clk. Tr. p. 42]; it provided for an increase in the contributions to the Pension Plan [Clk. Tr. p. 42]. It even provided for a differentiation as to some of the Locals as follows [Clk. Tr. p. 44]:

> "4. The following I.A.T.S.E. Local unions only, shall have the option, exercisable on or before March 1, 1961, to elect to retain the Golden Hour (excessive hours) provisions of its 1959 agreement in their entirety, in lieu of accepting the change referred to in this Paragraph 8:
>
> 776;
> 659;
> 728;
> 80 and
> 683"

It *did not provide for a change with respect to 695 for Schedule "B" employees,* who did not get their 10%. This was a calculated *agreed-upon* omission and the memorandum was binding on everyone.

The Memorandum Agreement was signed by all of the negotiators and representative parties, to wit:

"The respective member companies of the Association of Motion Picture Producers, Inc.
By /s/ Charles Boren

I.A.T.S.E. and its Locals
By /s/ Richard F. Walsh

The respective member companies of the
Alliance of Television Film Producers, Inc.
By /s/ Richard W. Jencks

Basic Craft (including Local #399, Culinary;
Local, #40, Local #278, Local #274 and
Local #755"
By /s/ Ralph H. Clare"

This Memorandum Agreement was effectuated and wages were paid to every Local and approximately 22,000 members with the exception of Schedule "B" plaintiffs and appellants herein.

This, the District Court of Appeal has incorrectly stated or incorrectly concluded thereon.

3. At pages 10 and 11 of the Opinion, there is a quick reference to the fact that "this Memorandum is not in *final contract language* (emphasis ours)." Contract language or change in language does not mean divestiture of salaries or wages.

4. The reference by the District Court of Appeal, in its Opinion, to the fact that on February 6, 1961, there was a large meeting and the majority voted on one of the plans submitted does not gainsay the fact that plaintiffs knew nothing about the meeting; nothing about the intention to eliminate their 10% increase,

until the meeting itself. The record is replete with this and does not require further reference.

5. If there were an attempt to correct an inequity and since the knowledge thereof as amended by the defendants was discussed, strangely:

(a) It was not set forth in these variations of the Memorandum Agreement referred to above, no Minutes were taken of the discussions, no notes were taken of such discussions as stated by Mr. Batchelder, and we refer to the previous portion of this Petition (pp. 20-22, incl.)

On a matter which was to divest approximately 400 people of a 10% wage increase agreed to, *after* all Local negotiations had been completed, and said 10% wage increase was generally and clearly included in the Memorandum Agreement of 1961, certainly it confounds the imagination to believe that no notes were taken, no further negotiations were had between the parties after January 31, 1961, with respect to any attempted change or elimination of Schedule "C", and all this is omitted in the Opinion of said Court.

6. The District Court of Appeal in its Opinion, pages 13 and 14, ignored what was admitted by the testimony of Mr. Boren, defendant representative of the Motion Picture Producers. The Opinion states that whether these publications tend to prove that the specific increase for Schedule "B" Sound Technicians was entered into is highly questionable, and with a gesture of language dismisses the historically well-known film publications. Accordingly, said Court ignored the testimony of Mr. Boren with respect thereto.

Further, said Court, in its Opinion, ignored the effect of the official bulletin of the I.A.T.S.E., Defendant International, published in the spring of 1961 [Pltf. Ex. 1, Rep. Tr. p. 83, lines 16-22], which stated long after negotiations and the consummation of the Memorandum Agreement of January, 1961, as follows:

> "The new pact is for 4 years, with an immediate 10% wage increase to be followed by another 5% at the start of the second 2 years."

Mr. Boren testified that a joint statement was given to the Daily Variety and the Hollywood Reporter, under date of January 31, 1961, and that these newspapers reflected the statements given to them by Mr. Walsh of defendant International and all of the negotiators, and was the official position and statement of the parties [Pltf. Exs. 3 and 4; Rep. Tr. pp. 131 and 132].

7. It seems rhetorical to repeat that the statement by said Court in its Opinion at page 15 thereof on the question of Promissory Estoppel that there was no injury in reliance upon the Memorandum Agreement of January, 1961, when in fact plaintiffs and appellants have been deprived in reliance of the Memorandum Agreement, in reliance of the publication of Variety and the Hollywood Reporter given by the top negotiators jointly, in reliance of the official bulletin of the I.A.T.S.E., and have lost probably one half million dollars to date.

8. On pages 15, bottom, and 16 of the Opinion, said Court, in our opinion, grievously erred in finding that the Zeal-Fairbanks letter, representative of the defendant International, followed the customary procedure in advising the producers of the obligation to pay the

wages and that there were only going to be some minor changes. Minor changes would not involve wage canges.

9. At page 16 of its Opinion, the District Court of Appeal does neither affirm nor deny the Trial Court's findings that the language of the general wage increase is ambiguous.

It is very clear and unequivocal that the language of the general wage increase is unambiguous and very clear and that the District Court of Appeal should so have found.

The three major cases which do refer to some other cases on the same subject are as follows:

(a) *Huffman v. Ford Motor Co.,* 345 U.S. 330. In that case, there was a specific collective bargaining provision authorizing the action taken. This is not applicable in the instant matter where there was no provision in the Memorandum Agreement of January 1, 1961, authorizing a change in wages.

(b) In the case of *Humphrey v. Moore,* 375 U.S. 335, at page 338, it is clear again that there was a provision contractually with respect to a merger which would permit the very thing as determined by the parties.

Again, in the instant matter, there was no provision for depriving Schedule "B" plaintiffs of their 10% wage increase.

The entire theory of unionism would be catapulted into oblivion if the membership could not rely on the collective bargaining agreement, unless language therein permits amendments or changes.

(c) The most recent case cited by defendants and respondents, is that of the *International Longshoreman's and Warehousemen's Union v. Paul R. Kuntz, et al.,* 334 F. 2d 165. This case involved longshoremen and their seniority rights, right to priority of employment and, again, we have a definitive distinction which makes the case inapplicable to the instant matter. In the *Longshoremen's* case there was a Joint Labor Committee which was an adjunct of the Coast Committee and charged specifically with day-by-day administration of the contract. These committees had broad power to make amendments.

There is no provision in the memorandum agreement of January 1, 1961, in this matter, nor are there any joint committees permanently provided which make amendments during the lifetime of a given contract. May we again quote from the *Longshoremen's* case as follows:

> "The defendant P.M.A. is the collective bargaining representative of employers of ship clerks along the West Coast of the United States, and its co-defendant, I.L.W.U. is the representative of the clerks themselves. The parties' contract is administered by the Joint Coast Labor Relations Committee (Coast Committee), a body composed of

equal numbers (3) of employee-employer representatives having the broad power to make amendments and other changes in its provisions. The Seattle Checkers Joint Labor Committee (Local Committee), an adjunct of the Coast Committee, is charged with the day to day administration of the contract in the area of the Port of Seattle, subject always to the "ultimate control" of the Coast Committee. Accordingly, the Local Committee maintains the lists of longshoremen eligible for employment in Seattle and vicinity and *may make such increases or reductions in the number of men carried on them as it deems essential to a stable and sufficient labor supply.* It also has charge of the dispatching hall, investigates and adjudicates all grievances and disputes, and performs all other functions specified in the contract or assigned it by the defendants directly or *through the Coast Committee."* (Emphasis ours).

4. **Did the Trial Court, the District Court of Appeal in Its Opinion and the Supreme Court of the State of California in Denial of a Hearing, Violate the Fundamental Rights of the Plaintiffs, Appellants and Petitioners Herein as Protected Under Section 9a of the Labor Management Relations Act of 1947, as Amended (June 23, 1947, C. 121, Title 1, Section 101, 61 Stat. 143; 29 U.S.S. Section 159).**

The arguments heretofore advanced under this juncture of the three points are all equally applicable to this fourth point.

IX.
CONCLUSION.

From the foregoing facts and law, and based upon the entire record of this Court, it is urged that the Petition for Writ of Certiorari should be granted and that the decision of the Trial Court as affirmed by the District Court of Appeal and the Supreme Court of the State of California be reversed.

Respectfully submitted,

ALEXANDER H. SCHULLMAN,
LESLIE C. BURG and
RICHARD A. KARPF,
By ALEXANDER H. SCHULLMAN,
Attorneys for Plaintiffs, Appellants and Petitioners.

APPENDIX.

Exhibit A-1.

Application and Declaration of Alexander H. Schullman.

State of California, County of Los Angeles—ss.

Alexander H. Schullman, being sworn, declares:

That he is attorney of record for Plaintiffs and Appellants in the above matter.

That there is attached hereto and marked Exhibit "B" a document under date of January 18, 1963, signed by Zeal Fairbanks, International Representative, with respect to the five per cent increase in effect on February 1, 1963 and referring to the January 31, 1961 memorandum of agreement.

That it is clear from the date of this letter and the most recent receipt thereof by counsel and Declarant that this could not have been introduced at the trial of the case.

Wherefore, application is herein made to receive this in consideration of the matter before Your Honorable Court and in determining a Petition for Rehearing.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California, March 12, 1965.

/s/ Alexander H. Schullman
Alexander H. Schullman

Exhibit A-2.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, SUITE 1900, 1270 AVENUE OF THE AMERICAS, NEW YORK 20, N.Y.

Affiliated with the A.F.L.-C.I.O.
Richard F. Walsh International President.
Harland Holmden General Secretary-Treasurer
Walter F. Diehl Assistant International President
Telephones HOllywood 5-3117

Hollywood Office
7715 Sunset Blvd., Suite 218
Hollywood 46, California
January 18, 1963

REMINDER

Gentlemen:

In accordance with the Industry-I.A.T.S.E. Labor Agreements as negotiated and put into effect January 31, 1961, provisions were made for an additional five percent increase across the board for all Hollywood I.A.T.S.E. members employed in their respective crafts effective February 1, 1963.

Therefore, kindly change your rates and put into effect the five percent increase covering I.A.T.S.E. personnel beginning as of midnight, January 31, 1963.

Sincerely,

/s/ Zeal Fairbanks
Zeal Fairbanks
International Representative

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Four.

James Thomson, et al., Plaintiffs and Appellants, vs. International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, etc., et al., Defendants and Respondents. Civ. No. 27179.

Filed: February 23, 1965.

Appeal from a judgment of the Superior Court of Los Angeles County. Harold W. Schweitzer, Judge. Affirmed.

Judgment for defendants in an action for breach of contract and for breach of a union's duty of fair representation, affirmed.

Alexander H. Schullman, Leslie C. Burg, and Herbert E. Selwyn, for Plaintiffs and Appellants.

Bodkin, Breslin & Luddy, and Michael G. Luddy, for union Defendants and Respondents.

O'Melveny & Myers, Charles G. Bakaly, Jr., and Stuart K. Mandel, for Association of Motion Picture Producers, Inc., et al., Defendants and Respondents.

The plaintiffs and appellants, five in number, are individuals who have been employed and are now employed as sound technicians in the motion picture and television industry in the Hollywood area. They are members of defendant and respondent International Sound Technicians Local 695, hereinafter referred to as defendant Local, and their complaint has been filed individually and on behalf of 350 members of said Local 695, "similarly situated." They appear as persons employed under Schedule B of the contract, hereinafter

discussed, and as representatives of all Schedule B employees. Defendant Local was and is the certified bargaining representative of its members and is a chartered local of defendant and respondent, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, hereinafter referred to as defendant International, with which 24 locals, engaged in the motion picture and television industry in the Hollywood area are chartered.

Certain individual defendants and respondents were officers and members of negotiating committees of defendant Local in connection with negotiations with employers, hereinafter described, which resulted in a collective bargaining agreement. Defendant and respondent Thomas Carman, was, at all times material, the business representative of defendant Local. Defendant and respondent, Richard Walsh, is, and at all times material has been, president of defendant International. Defendant and respondent, George Flaherty, at all times material, was the international representative of defendant International.

The major representatives of the defendants and respondents motion picture and television producers in the Hollywood area were the defendants and respondents Association of Motion Pictures Producers, Inc., and its negotiator, defendant Charles Boren, and the Alliance of Television Film Producers, Inc., and its negotiator, defendant Richard W. Jencks. All of the above will hereinafter be described as defendant Producers.

The complaint, filed July 3, 1961, seeks relief for breach of contract; for specific performance; for permanent injunction; for general and special damages;

for exemplary damages; for payment of retroactive wages; for constructive trust and an accounting; declaratory relief; in equity, for reasonable counsel fees, and for promissory estoppel. The answer was filed September 8, 1961. The trial of this matter commenced on April 19, 1962, without a jury, and lasted to and including May 9, 1962, with occasional continuances. On July 6, 1962, the trial court made its Findings of Fact and Conclusions of Law, and on the same day entered judgment for defendants in this matter. On July 23, 1962, plaintiffs filed a Notice of Intention to Move for a New Trial, and on August 2, 1962, the motion for new trial was argued, and said motion was denied. Plaintiffs have appealed from the judgment rendered in favor of defendants.

We set forth the basic facts which constitute the background for the present litigation. The facts as here stated were either uncontradicted, or were found by the trial court, on sufficient evidence, to be true and are, thus, facts which we are bound on this appeal to accept.

For many years members of defendant Local, in all classifications of seniority except the very lowest could have been employed under four different schedules in accordance with the desires of the Producers. Each such sound technician could have been employed under Schedule A, by which he was guaranteed one day's employment; the same sound technician could have been employed under Schedule B, by which he was guaranteed a minimum of one week's employment but by which he received a lower hourly rate of pay; the same sound technician could have been employed under Schedule C, by which he was guaranteed a minimum of six weeks'

employment but by which he received a lower hourly rate of pay than under Schedule B; or the same sound technician could have been employed under Schedule D, by which he was guaranteed a minimum of one year's employment but by which he received a lower hourly rate of pay than under Schedule C.

Although plaintiffs, and the other technicians whom they claim to represent herein, were normally employed under Schedule B, the trial court found, on evidence sufficient to support the finding, that:

> "27. During the two-year period prior to January 30, 1961 most of the individual sound technicians were employed under Schedule A for a portion of the period, under Schedule B for a portion of the period and under Schedule C for a portion of the period. A total of approximately 225 sound technicians were employed by individual studios operated by the members of defendant Association under both Schedule B and Schedule C during the two-year period prior to January 30, 1961. In addition most sound technicians were employed by many different members of defendant Association as well as by other motion picture producers and were employed under Schedule B at one studio and under Schedule C at another during said two-year period.
>
> "28. During the two-year period prior to January 30, 1961 most of the plaintiffs were employed by some of the Producer defendants under Schedules A and B, although most of them had at some time prior thereto been employed under Schedule C and some of them had been employed under Schedule C during the two-year period prior to January 30, 1961."

Commencing in 1946, defendant Local demanded the elimination of Schedules C and D, because these schedules had become inequitable and discriminatory to the members. Defendant Local maintained that the guarantee of six weeks' or one year's employment was not as advantageous as previously and did not outweigh the disadvantages of the much lower hourly rates of Schedules C and D. Moreover, many sound technicians were in fact being employed for six weeks or longer. Thus there developed, according to defendant Local, the inequitable situation of sound technicians in the same classification working side by side but getting paid substantially different hourly rates. This was the inequity of which defendant Local complained. Furthermore, by 1959, the inequity and discrimination had become greater after each negotiation because of percentage increases given to all schedules.

The defendant Producers consistently resisted these demands on the ground that elimination of the right to employ sound technicians under Schedules C and D would greatly increase their costs. However, in the 1959 negotiations, when defendant Local's only demand was to eliminate Schedules C and D, defendant Producers finally agreed to eliminate Schedule D, the yearly guarantee, because it was seldom used. But the Producers continued to resist elimination of Schedule C on the ground that it would cost them several hundred thousand dollars in addition to the cost of a wage increase, and would, in effect, amount to a 26 per cent increase in the cost of employing sound technicians. Negotiations on this issue continued several months after the Memorandum Agreement of 1959 had been entered into, at which time the required pre-strike notification was transmitted

by defendant Local to the Federal Mediation and Conciliation Service. The impasse was finally resolved by the defendant Producers agreeing that, if a sound technician who was employed under Schedule C remained employed for more than six weeks he must receive a six weeks' guarantee at the expiration of the first six-week period in addition to his original minimum guarantee of six weeks' employment.

However, this new agreement, in operation for two years, resulted in a further inequity. Sound technicians with the greater seniority were being adversely affected by the use of Schedule C with its new requirement of successive guarantees of an additional six weeks. Sound technicians with lesser seniority, whose employment exceeded the six weeks' block of employment were being automatically guaranteed a second six weeks' block of employment, and, consequently, could not be laid off until the completion of the second six weeks' block. As a result sound technicians with greater seniority were being laid off, while those with lesser seniority continued to be employed.

In the 1961 negotiations, defendant Local's principal demand again was to eliminate Schedule C. The defendant Producers again resisted the demand. In fact, some of the defendant Producers who had not previously used Schedule C to any appreciable extent were considering increasing their employment under this schedule. The defendant Producers resisted the demand because to accede to it would cost approximately $700,000 in addition to the cost of any wage increase and would open the door to similar demands by other locals.

Defendant Boren, however, did suggest, at a bargaining session on January 5, 1961, that the wage sched-

ules might be increased disproportionately, so as to substantially cure the inequity between B and C rates. He further stated that such a disproportionate increase to Schedule C might cause it to fall into substantial disuse by the defendant Producers and thereby defendant Local would, in practice, achieve an elimination of Schedule C. Defendant International and defendant Local did not accept defendant Boren's proposal at that time, but continued to demand the elimination of Schedule C. At a bargaining session held on January 27, 1961, the subject was again discussed, with defendant Boren stating that the defendant Local had a "self-help" remedy by increasing the wage schedules disproportionately in such a way as to eliminate any inequity thought to exist. Finally, at a meeting on January 28, 1961, the defendant Producers and the defendants International and Local stated that defendant Local was to be given the right either to increase the wage schedule disproportionately by any amount of money to be measured by a percentage of the total payroll in order to eliminate the inequity, provided that the cost to defendant Producers could not exceed the percentage increase of the total payroll for sound technicans agreed upon in the negotiations, or to increase the wage schedules proportionately by a percentage of the total payroll and therefore not eliminate the equity. Such percentage increase was later agreed by the parties to be 10 per cent.

On January 30, 1961, defendants Boren and Jencks, on behalf of defendant Producers, and defendant Walsh on behalf of defendant International, executed a document entitled "Memorandum Agreement of 1961." It provided in part for a "10 per cent general increase"

to all locals. It also provided that, "This memorandum is not in final contract language. A formal agreement shall be drafted between the parties, as soon as possible.

Defendant Carman apprised the executive board of defendant Local of the alternative proposals before them. The executive board of defendant Local, adopted a recommendation of its steering committee and negotiating committee that the two alternative plans be placed before a general meeting of the membership on February 6, 1961, for discussion and action. On February 6, 1961, a general membership meeting was held, which was described in the testimony at trial as the largest in the defendant Local's history. At that meeting, a majority of the membership, by vote, approved and ratified all of the changes and modifications in the most recently current collective bargaining agreement with the single exception of changes and modifications with respect to wage rates for the classifications and schedules. On motion of one of the named plaintiffs, it was determined by the membership that, as to such changes and modifications with respect to wage rates, a subsequent ballot by mail should be taken for the purpose of choosing either a proportional increase or a disproportionate increase between Schedules A and B.

Between February 9, 1961, and February 23, 1961, the secret ballot by mail was conducted, which resulted in the approval by a majority of the membership of defendant Local of a plan whereby wage rates under Schedule A were to be increased approximately 10 per cent, the wage rates under Schedule B were to remain the same, but the wage rates under Schedule C were to be increased approximately 20 per cent.

The disproportionate increase in Schedule C rates so increased this schedule that they are now almost equal to Schedule B rates. The effect of this disproportionate increase was to substantially remove the inequity as well as to decrease the use of Schedule C by the defendant Producers by 50 per cent in the first year of the new agreement.

I

Plaintiffs' first contention is that the Memorandum Agreement of 1961, which provided for a "10 per cent general increase" to all locals is a binding contract vesting in plaintiffs the right to said increase. However, ample evidence was presented at trial that an oral agreement had been reached by the negotiating committees that any and all tentative understandings or agreements reached by the negotiating committees, such as those contained in the Memorandum Agreement of 1961, would not be final until ratified by the memberships of the various locals of defendant International and approved by each of the defendant Producers. This ground rule, it appears from the evidence, had, in fact, been in effect in each negotiation between the parties since 1947.

During the trial, but not on appeal, plaintiffs objected to the use of this parol evidence. However, the rule is clear that the parol evidence rule does not prevent the admission of testimony to ascertain whether a document, claimed to be an agreement, was so intended by the parties. (*Halldin v. Usher* (1958) 49 Cal.2d 749.) Furthermore, "It may also be shown that the writing was not intended as a final act because it is not to become effective until some condition happens."

(Witkin, California Evidence (1958), § 367, p. 409, and cases cited therein.)

Plaintiffs refer the court to some evidence presented at trial to the effect that various defendants, representatives of defendants and local trade journals, either admitted or published news of the general increase of 10 per cent. Whether these "admissions" and publications tend to prove that a specific increase for Schedule B sound technicians was entered into is highly questionable, since the Memorandum Agreement of 1961 was the result of negotiations concerning the contract demands of twenty-four different locals. At any rate, these "admissions," at the best, merely permitted an inference in support of plaintiffs' contention; they were only part of the evidence before the trial court and its finding of fact that the Memorandum Agreement of 1961 was not a final and binding agreement is supported by substantial evidence.

II

Plaintiffs next contend that the defendants are promissorily estopped from asserting the lack of ratification of the Memorandum Agreement of 1961. They assert that the Memorandum Agreement of 1961, containing the 10 per cent general wage increase, was a promise clear and unambiguous. Whatever merits there are to this point, it is nevertheless clear that all of the elements of promissory estoppel are not present in this case.

These elements are set forth in the case of *Graddon v. Knight* (1956) 138 Cal.App.2d 577, 583:

> ". . . (i) a promise clear and unambiguous in its terms (*National Dollar Stores, Ltd. v. Wagnon,*

97 Cal.App.2d 915 [219 P.2d 49]); (2) reliance by the party to whom the promise is made (*Estate of Jackson,* 112 Cal.App.2d 16 [245 P.2d 684]); (3) his reliance must be both reasonable and foreseeable (*Pacific Finance Corp. v. Hendley,* 119 Cal.App. 697 [7 P.2d 391]); Rest. Contracts, § 90); (4) the party asserting the estoppel must be injured by his reliance (*National Dollar Stores, Ltd. v. Wagnon, supra*)."

Plaintiffs assert that the deprivation of a 10 per cent wage increase, so that plaintiffs received no wage increase for the year, represented injury to them. This may be true. But it does not establish that the injury is the result of reliance upon the Memorandum Agreement of 1961.

Other lesser arguments are made, attacking the findings in favor of the finality or enforceability of the subsequent "Basic Agreement." Plaintiffs point to the letter of Zeal Fairbanks, a representative of defendant International, which required adherence to the Memorandum Agreement of 1961 with the exception of minor changes. However, if this letter indicates a desire on the part of the negotiators to preclude a specific change in the wage scale of Schedule B from that provided for in the Memorandum Agreement of 1961, it is in conflict with other substantial evidence presented in the case. In such an event the trial court is free to believe whichever evidence it deems to be the weightier.

III

Defendants contend that portion of the Memorandum Agreement of 1961 providing for:

> "General Wage Increases.
> "a) 10% general increase commencing as of January 31, 1961."

is ambiguous. The trial court so found. However, it is unnecessary to decide this point as it is also unnecessary to decide whether the plaintiffs are third party beneficiaries to the Memorandum Agreement of 1961 rather than principals and thereby unable to enforce the agreement even if it were final and binding—an issue which the trial court decided adversely to plaintiffs.

Even if the Memorandum Agreement of 1961 were final and binding it would vest in plaintiffs no interests which could not be impaired or extinguished by a subsequent agreement.

The trial court found that, in February 1961, the Basic Agreement was executed by defendant International and by defendant Producers. That agreeement provides in part that:

> "This agreement . . . shall, as of its effective date, terminate and replace the Memorandum Agreement of 1961 between the parties hereto dated January 30, 1961. . . ."

The case of *International Longshoremen's and Warehousemen's Union v. Kuntz* (1964), 334 F.2d 165 (9th Cir.) answers plaintiffs' contention. That case involved an amendment to the collective bargaining contract whereby thirty-eight employees, who had been allowed to register into a higher classification for seniority under the unamended contract, were forced to deregister

under the amended contract. Thereafter, under the amended contract, fifty-three positions were made available in the higher seniority classification whereby the original thirty-eight lost seniority vis-a-vis the new registrants.

The court said, at page 171:

> "The settlement of a labor dispute, whether accomplished by amendment of the contract or by resort to an already existing contract provision, may affect rights which in other fields are regarded as vested and in a manner which would be deemed *'ex post facto.'* But where the power to bargain is not limited by the contract and since '[c]ompromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation,' [*Ford Motor Co. v. Huffman,* 345 U.S. at 338, 73 S.Ct. at 686] we believe that when 'vested rights' are impaired or extinguished in the course of the bargaining, any recourse by the person affected must then depend upon *'a bad faith motive, an intent to hostilely discriminate'* on the part of the bargaining representative. And here, even aside from the plaintiff's affidavit asserting that no such discrimination existed, there is not the slightest suggestion of bad faith on defendants' part." [Emphasis added.]

IV

The next contention which plaintiffs urge, is that defendant unions violated their duty of fair representation. The United States Supreme Court, in the leading case of *Steele v. Louisville and Nashville Railroad Co.* (1944), 323 U.S. 192, 202-203, held that:

> "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body *both to create and restrict the rights of those whom it represents,* [citations] but it has also imposed upon the representative a corresponding duty . . . to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." [Emphasis added.]

In the instant case, it is clear that the rights of the Schedule B employees were restricted by the failure to give them a wage increase. This the union representatives had a right to do as long as it was in the best interests of the union (*Ford Motor Co. v. Huffman* (1953) 345 U.S. 330), and devoid of hostile discrimination. The facts of the instant case establish both of these elements.

For some time the use of Schedule C had plagued the union. Many defendant Producers employed sound technicians under that schedule in order to make use of the lower scale of wages involved. Furthermore, dissention among union members was caused when some sound technicians were paid the higher wage rates under Schedules A and B while on the same job with those employed under Schedule C and earning a salary at a lower wage rate. Furthermore, the added six-weeks' guarantee negotiated in the 1959 contract for sound technicians employed under Schedule C caused many of those with lesser seniority to be employed while those with greater seniority working under another schedule were laid off. The problem became even more aggravated when it was learned that some of the defendant Producers who theretofore had not substan-

tially made use of Schedule C were planning to do so. It is clear that the negotiators for defendant unions would have preferred to eliminate Schedule C outright. Unable to do this, they decided to disproportionately increase the wage rates under Schedule C while at the same time withholding any increase in the wage rates under Schedule B so as to bring the two schedules more closely into line. With much of the economic advantage attendant to the use of Schedule C by the defendant Producers gone, it was reasoned that Schedule C would fall into disuse. As of now, this is exactly what is happening. It is readily apparent that the negotiators for the defendant unions had in mind the best interests of the union members as a whole and that any intent toward hostile discrimination was absent. In fact, during the tenure of defendant Carman as business representative of defendant Local, the named plaintiffs Daniels and Thompson were promoted to higher permanent classifications. Such promotions could not have been achieved without the sanction of defendant Local.

In addition, as we have pointed out above, all of the plaintiffs were subject to being employed under any of the schedules, from time to time, at the whim or discretion of the particular employer currently involved. Under these circumstances, it is impossible to say that the total process of negotiations, culminating in the final "Basic Agreement" which contained the wage rates complained of, was intended to discriminate against any individual member or against any definable group of members—the negotiations and the final agreement clearly were, as the trial court found, intended to be for the benefit of the union as a unit. This was the duty of the negotiators; they had no other.

V

Finally, plaintiffs assert that the Basic Agreement of 1961, which provided for the disproportionate increase in wage rates for Schedule C and the previous (unincreased) wage rates for Schedule B was never ratified by defendant Local. They allege that no notice of the meeting of February 6, 1961, was sent out advising the membership that a vote on the terms of the Basic Agreement of 1961 was to be taken. The trial court found to the contrary. In fact, as the evidence showed and the trial court found, the meeting of February 6, 1961, was one of the largest in the history of the union. Furthermore, the issue herein involved—the provisions calling for a disproportionate increase in wage rates for Schedule C and the lack of an increase in wage rates for Schedule B—was not voted on at that meeting but was rather voted on in secret ballot by mail between February 9 and February 23, 1961, and ratified. There is no merit to this contention.

The judgment is affirmed.

Kingsley, *J.*

We concur:

Jefferson, *J.*

Frampton, *J. Pro Tem.**

*Assigned by Chairman of Judicial Council.

State of California, County of Los Angeles, ss.

I, the undersigned, being duly sworn according to law, depose and say:

I am one of the plaintiffs, appellants and petitioners in the above entitled action; I have read the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of California and Brief in Support thereof and know the contents thereof; and that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

Dated: August 8, 1965.

JAMES THOMSON.

JAMES THOMSON.

Subscribed and sworn to before me this 8th day of August, 1965.

HERBERT E. SELWYN

[Seal] HERBERT E. SELWYN

Notary Public in and for said County and State.

My Commission expires April 29, 1967.

Office-Supreme Court, U.S.
FILED
OCT 6 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 559

JAMES THOMSON, et al.,

Petitioners,

vs.

THOMAS CARMAN, et al.,

Respondents.

On Petition For A Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California.

BRIEF FOR RESPONDENTS ASSOCIATION OF MOTION PICTURE PRODUCERS, INC., ET AL., IN OPPOSITION

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Of Counsel

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Respondents.

On Petition For A Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California.

BRIEF FOR RESPONDENTS ASSOCIATION OF MOTION PICTURE PRODUCERS, INC., ET AL., IN OPPOSITION

This brief in opposition is submitted on behalf of Respondents Association of Motion Picture Producers, Inc., Charles Boren, Allied Artists Productions, Inc., Columbia Pictures Corporation, Screen Gems, Inc., Walt Disney Productions, Metro-Goldwyn-Mayer Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, Twentieth Century-Fox Television, Inc., Warner Bros. Pictures, Inc., Alliance of Television Film Producers, Inc., Richard W. Jencks,

Jack Chertok Television, Inc., Desilu Productions, Inc., Filmaster, Inc., Four Star Television, Lassie Television, Inc., Jack Wrather Pictures, Inc., Mark VII Ltd., MCA Inc., Wyatt Earp Enterprises, Inc., Ziv-United Artists, Inc., and Bachelor Production Company, hereinafter referred to as "producer respondents".

Opinions Below

The oral opinion of the Superior Court of the County of Los Angeles, State of California (hereinafter referred to as "Superior Court") is set forth in appendix A to this brief and is not officially reported. The opinion of the District Court of Appeal of the State of California Second Appellate District, (hereinafter referred to as "District Court of Appeal") entitled James Thomson, et al., vs. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, etc., et al., is set forth in the appendix to the petition at pages 3-18 and is reported at 232 A.C.A. 539.

Jurisdiction

The judgment of the District Court of Appeal affirming the judgment of the Superior Court was entered on February 23, 1965, and a petition for rehearing was denied without opinion on March 16, 1965. A petition for hearing before the Supreme Court of California was denied without opinion on May 12, 1965.

The jurisdiction of this Court is sought to be invoked under Section 301 of the Labor-Management Relations Act of 1947, as amended (61 Stat. 156, 29 U.S.C. §185 (1964)).

Jurisdiction is challenged by this brief.

Questions Presented

1. Whether the findings of fact to the effect that the Memorandum Agreement of 1961 was not a final and binding collective bargaining agreement vesting petitioners with any rights, are clearly erroneous.

2. If such findings of fact are clearly erroneous, whether respondents acting in good faith and without hostility to petitioners could properly modify the terms of such collective bargaining agreement.

Statutes Involved

The pertinent portions of Sections 9(a) and 301 of the Labor Management Relations Act of 1947, as amended, (61 Stat. 143, 156, 29 U.S.C. §§ 159(a), 185 (1964)) are set forth in appendix B to this brief.

Statement

The petition fails throughout to present an accurate and complete description of the facts and events leading up to and underlying the dispute herein. For a complete and accurate statement of the facts herein, the Court is referred to the opinion of the District Court of Appeal (appendix to the petition, at pages 3-18), affirming the findings of fact of the Superior Court.

ARGUMENT

The Opinion of the District Court of Appeal Turns Upon an Analysis of Particular Facts Presenting no Important Question of Federal Law.

The petition is manifestly clear in asserting that petitioners' various causes of action all evolve from and are based exclusively upon respondents alleged breach of the so-called Memorandum Agreement of 1961, which petitioners contend was a final and binding collective bargaining agreement vesting them with certain rights. After a careful review of the evidence presented at the trial, the District Court of Appeal held that there was substantial evidence to support the Superior Court's findings of fact that the Memorandum Agreement of 1961 was not intended to be and was not in fact a final and binding collective bargaining agreement between the union and producer respondents and that therefore petitioners had acquired no vested rights whatever by such document.

As is made evident in the opening statement of the petition at pages 4 to 7, the asserted "federal question of substance" presented by petitioners *assumes* that the Memorandum Agreement of 1961 was in fact a final and binding collective bargaining agreement and that it was thereafter "changed" by respondents to the injury of petitioners. As shown by the fact that the great bulk of the petition is devoted to a recitation of petitioners' evidence on the factual issue of whether the Memorandum Agreement was a final and binding agreement, *even petitioners* recognize that their asserted "federal

question of substance" *cannot* appropriately be reached until and unless the Court were to *first* review all of the evidence presented at trial and conclude therefrom, contrary to the conclusion of the District Court of Appeal, that the findings of fact made by the Superior Court were clearly erroneous.

Viewed as such, the petition falls squarely within the many decisions of the Court, which have made it clear that certiorari will be denied where review is sought of a lower court opinion which turns solely upon an analysis of the particular facts involved or upon the construction of particular contracts. As stated in *United States v. Johnson,* 268 U.S. 220, 227 (1925), "we do not grant a certiorari to review evidence and discuss specific facts." Similarly, in *General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175, 178 (1938) the Court held that "granting of the writ (of certiorari) would not be warranted merely to review the evidence or inferences drawn from it." See also, *Aetna Life Ins. Co. v. Dunken,* 266 U.S. 389, 394 (1924); *Portland Railroad, Light and Power Company v. Railroad Comm'n. of Oregon,* 229 U.S. 397, 411-412 (1913).

The salutory principles announced in the above cited decisions of this Court would seem to require a refusal by this Court to accede to petitioners' request that it review the facts of this case.

In Any Event No Substantial Federal Question is Presented.

It is essential to the jurisdiction of this Court under 28 U.S.C. Section 1257 that a substantial federal ques-

tion be presented. A federal question is insubstantial where it is so foreclosed by prior decisions of the Court as to leave no room for controversy. See e.g. *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 391 (1952); *Zucht v. King*, 260 U.S. 174, 176-177 (1922); *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902).

If the Court were to grant certiorari, review the extensive record and thereafter conclude contrary to the District Court of Appeal that the findings of fact by the Superior Court were clearly erroneous, it would then be faced with the question of whether the union respondents, acting in good faith and without hostility, together with the producer respondents could properly modify the terms of the collective bargaining agreement.*

The opinion of the District Court of Appeal in regard to such question was that a collective bargaining agent has the clear right and power to modify an existing collective bargaining agreement, notwithstanding possible injury to certain of those employees that it represents, so long as in so doing the bargaining agent complies with the duty of fair representation owed by it to all members by acting in good faith and without an intent to hostilely discriminate against certain members. (opinion of the District Court of Appeal, appendix to the petition at pages 15-17)

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* Petitioners apparently do not seriously contend that the findings of fact of the Superior Court to the effect that the union respondents were acting in good faith and without hostility were clearly erroneous.

It is submitted that the opinion of the District Court of Appeal on this question is fully supported by the decisions of this Court in *Humphrey v. Moore,* 375 U.S. 335 (1964); *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953); *Aeronautical Industrial District Lodge v. Campbell,* 337 U.S. 521 (1949); *Steele v. Louisville & Nashville Railroad Co.,* 323 U.S. 192 (1944). These decisions stand for the proposition, *now settled beyond controversy* and clearly applicable to the instant case even as it is viewed by petitioners, that a union in the exercise of its statutory power may, in collective bargaining, enter into agreements, be they original agreements or modifications thereof, restricting the rights of all or a minority of the employees represented and resulting in what might in other areas of law be viewed as a deprivation of vested rights, so long as in so doing it does not breach its duty of fair representation by acting in bad faith or with hostility.*

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* Accord: *International Longshoremen's and Warehousemen's Union v. Kuntz,* 334 Fed.2d 165 (9th Cir. 1964); *Hardcastle v. Western Greyhound Lines,* 303 Fed.2d 182 (9th Cir. 1962), *cert. denied* 371 U.S. 920 (1962); *Potlatch Forests Inc. v. International Woodworkers of America,* 108 Fed.Supp. 906 (D. Ida. 1951), *aff'd sub nom. Olsen v. Potlatch Forests, Inc.,* 200 Fed.2d 700 (9th Cir. 1953); *Hartley v. Brotherhood of Ry. & S.S. Clerks,* 283 Mich. 201, 277 N.W. 885 (1938).

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Oral Opinion of the Superior Court*

LOS ANGELES, CALIFORNIA, WEDNESDAY, MAY 9, 1962, 1:40 P.M.

THE COURT: Both sides ready?

MR. SCHULLMAN: Yes, your Honor.

MR. LUDDY: Yes, your Honor.

THE COURT: I was going to make a few comments here, Mr. Luddy. Mr. Schullman, in his argument, stressed the point that the defendant unions and the majority of the local, as well as the Board of Directors of the local, were taking something away from the plaintiffs. Mr. Schullman made reference to the California Constitution and the Federal Constitution, cited a number of cases, and referred generally to other cases and said that that can't be done.

I should say further that that argument is based on the assumption that the memorandum agreement gave to these plaintiffs something that was later taken away.

It is my opinion in this case that the memorandum agreement was not a final and a binding agreement, and therefore that type of argument is not applicable under the facts here.

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* The oral remarks of the Superior Court made at the conclusion of argument, which we have interpreted to be the opinion of the court, are set forth in the reporter's transcript at pages 1508 to 1528. We have reproduced herein pages 1508 to 1514, line 9, which contain all relevant portions of the court's opinion, thereby omitting an extensive dialogue which followed between counsel and the court regarding proposed findings on subsidiary issues relating essentially to the capacity of the parties to sue and be sued.

Not only does the agreement in a concluding paragraph thereof indicate it is not a final agreement, but also it was expressly understood by all of the negotiators that no agreement was to be binding until approved by the respective Boards of Directors of the producers and the various unions involved.

That agreement never was ratified by those groups. The only agreement that was ratified was the basic agreement and the sound technicians' agreement of 1961. Therefore, it is my finding that the memorandum agreement of 1961 was not a final and binding agreement.

MR. SCHULLMAN: Your Honor, in view of that statement, may I suggest there is no purpose in further argument on either side. I have anticipated this, in all due deference to the Court. I think the Court is grossly in error, but that doesn't mean that I am right. I will be ready to accept your Honor's decision in this matter.

THE COURT: Well, I thought I might make a few comments here because I anticipate findings will be desired.

MR. SCHULLMAN: Yes, they will, your Honor.

THE COURT: And it might be helpful in the draftsmanship of the findings.

MR. SCHULLMAN: Yes. Well, your Honor, I'm going to be very candid, as I always am in every case, and with due respect to the Court, I think I have mentioned aliunde the courtroom that I loved to come in this courtroom always because I do enjoy being here before this Court. I do feel, as I do for my clients, that this Court

is grossly in error and will be in error with a miscarriage of justice. I am glad that your Honor did that because my first intention, as evinced to my clients, was to say this morning: If your Honor is of the firm opinion that the 10% as provided for in the memorandum agreement is not valid and subsisting, then it would obviate argument, because I don't like to argue in a vacuum. But I deferred doing it because I have a great respect for this Court, irrespective of this colloquy.

With that in mind — I hate to say this — and it doesn't make any difference — I mean, if the Court is correct, my anticipating of your decision doesn't change it. If the Court is wrong, my anticipation doesn't change it. I do feel the Court is in error, and I am not going to argue it or make a motion for new trial. I recognize I have anticipated, in all fairness, and told my clients four days ago that in my opinion the Court will so rule, honestly and conscientiously and as it sees fit. Under those circumstances, I think it would only be a waste of time to require additional argument either on the part of defendants or on my part, because I think that is your Honor's conviction and desire and opinion with respect to this case.

THE COURT: I thought you were through with your argument.

MR. SCHULLMAN: I am, your Honor, but I don't think it is necessary to sit here for four hours and listen to argument when the decision is pretty much determined by the Court.

THE COURT: I thought I would make comments with respect to my decision here, and I don't think there is any need for any argument from the defendants. I think that these comments will be helpful, however, in connection with findings, and that is what I have in mind, Mr. Schullman.

MR. SCHULLMAN: All right, your Honor.

THE COURT: The memorandum agreement, even if it be found to have been a binding and effective agreement, was rescinded by the express wording of the basic agreement of 1961, and Paragraph 11 thereof provides in part: "This agreement shall, as of its effective date, terminate and replace the memorandum agreement of 1961 between the parties hereto dated January 30, 1961."

Under the circumstances, that clearly shows that the parties themselves, even if that memorandum agreement had been the final agreement, those parties did rescind it, and all I can do is call your attention to Section 1559 of the Civil Code of California, which provides that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it. The parties here have rescinded the contract, so the plaintiffs — even if it be said that the contract was made expressly for their benefit, and I question that it was — the plaintiffs have no right to enforce this agreement.

First, as I say, the agreement was rescinded; second, I say that the plaintiffs have no right to enforce it, and incidental benefits conveyed by an agreement to a third

person don't give that third person any right of enforcement. It has to be for the express benefit of the plaintiffs, and so I find that the memorandum agreement was not a collective bargaining agreement enforceable by these plaintiffs.

Furthermore, I find that, and I will say this — the evidence in my opinion is overwhelmingly in support of the contentions of the defendants that there was no breach of the duty of fair representation in this particular case on the part of either the defendant local or the International Alliance or any of the agents or officers of those organizations.

I find that the evidence indicates they acted in good faith and without hostile discrimination to any of the plaintiffs or persons in the plaintiffs' class.

I can't help but quote from Ford Motor Company v. Hoffman, 345 U.S. 330, at page 338, where the United States Supreme Court said:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make it invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents subject to complete good faith and honesty of purpose in the exercise of its discretion. Compromises on a temporary basis with a view to long range advantages are natural incidents of negotiations."

At first blush it might be said that the wage scales set forth in the sound technicians' agreement of 1961 are discriminatory but the evidence, as I said, clearly indicates to the contrary. I think they were set up in good faith to eliminate inequities and these inequities were a cause of dissension in the union for some years and I think all members of the union recognized this problem and all the members had in mind that something had to be done sooner or later to eliminate those inequities.

It is my opinion the basic agreement of 1961 and the sound technicians' agreement of 1961 were fair and reasonable and that they are valid, binding, and subsisting contracts. I don't know that any additional comments are necessary.

APPENDIX B

Statutes Involved

Section 9(a) of the Labor Management Relations Act of 1947, as amended (61 Stat. 143, 29 U.S.C. § 159(a) (1964)), provides as follows:

> **"(a) Exclusive representatives; employees' adjustment of grievances directly with employer.**
>
> "Representatives designated or selected for the purposes of collective bargining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment."

Section 301 of the Labor Management Relations Act of 1947, as amended (61 Stat. 156, 29 U.S.C. § 185 (1964)), provides in pertinent part as follows:

> **"§ 185. Suits by and against labor organizations.**
>
> **"(a) Venue, amount, and citizenship.**

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

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IN THE

Supreme Court of the United States

October Term, 1965
No. 559

JAMES THOMSON, *et al.*,

Petitioners,

vs.

THOMAS CARMAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California.

BRIEF FOR RESPONDENTS CARMAN, ET AL., IN OPPOSITION.

Respondents International Sound Technicians, Local 695, referred to hereinafter and in the proceedings in the Court below as Defendant Local, International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada an international labor union with approximately 1,000 chartered locals, including Defendant Local, located in various communities in the United States and Canada, individual respondents who were officers or members of the negotiating committee and held other offices with Defendant Local, Thomas Carman, Business Representative of Defendant Local, Richard Walsh, Inter-

national President of International Alliance of Theatrical Stage Employes, George Flaherty, International Representative of International Alliance of Theatrical Stage Employes, file this Brief in opposition to the petition for a Writ of Certiorari on file herein.

Opinions Below.

The oral opinion of the Superior Court of the County of Los Angeles, State of California, sometimes hereinafter referred to as "Superior Court," is not officially reported but is set forth as Appendix A in the Brief in Opposition for respondents Association of Motion Pictures, Inc. *et al.*, on file herein. The opinion of the District Court of Appeal of the State of California Second Appellate District, sometimes hereinafter called "District Court of Appeal" entitled James Thomson, *et al.* v. International Alliance of Theatrical Stage Employes, *et al.*, is set forth in the Appendix to the Petition for a Writ of Certiorari at pages 3 to 18 and is reported at 232 A.C.A. 539.

Jurisdiction.

On February 23, 1965, the judgment of the District Court of Appeal affirming the judgment of the Superior Court was entered and a petition for rehearing was denied without opinion on March 16, 1965. The Supreme Court of California denied without opinion a petition for hearing before it on May 12, 1965.

Petitioners seek to invoke the jurisdiction of this Court under Section 301 of the Labor-Management Relations Act of 1947, as amended (61 Stat. 156, 29 U.S.C. §185 (1964)). In this Brief the respondents on whose behalf it is filed challenge jurisdiction.

Questions Presented.

1. Whether the findings of fact to the effect that the Memorandum Agreement of 1962 was not a final and binding collective bargaining agreement vesting petitioners with any rights, are clearly erroneous.

2. If such findings of fact are clearly erroneous, whether respondents acting in good faith and without hostility to petitioners could properly modify the terms of such collective bargaining agreement.

Statutes Involved.

The pertinent portions of Section 9(2) and 301 of the Labor-Management Relations Act of 1947, as amended (61 Stat. 143, 156, 29 U.S.C. §§ 159(a), 185 (1964)) are set forth in Appendix A to this Brief.

Statement.

An accurate and complete description of the facts and events leading up to and underlying the dispute herein is not set forth in the petition. For a complete and accurate statement of such facts, this Court is referred to the District Court of Appeal opinion (Appendix to the petition herein at pages 13 to 18, 232 A.C.A. 539) which affirmed the findings of fact of the Superior Court.

ARGUMENT.

The Opinion of the District Court of Appeal Turns Upon an Analysis of Particular Facts Presenting No Important Question of Federal Law.

Petitioners' various causes of action all evolve from and are based exclusively upon alleged breach by respondents of the so-called Memorandum Agreement of 1961, which petitioners contend was a final and binding collective bargaining agreement vesting them with certain rights.

Petitioners neglect to inform this Court of two controlling and important elements which were discussed by the Superior Court and by the District Court of Appeal. They are (1) the making of an oral agreement by all of the parties before the negotiations began that no agreement would be final and binding until it had been approved by the employers and ratified by the respective locals, and (2) that long before this action was instituted the parties executed a document known as "Basic Agreement," by the terms of which the earlier Memorandum Agreement was rescinded.

Furthermore, as shedding light on the verity of the conclusions of the courts below to the effect that there was no hostile discrimination nor breach of any duty of fair representation on the part of the respondents, it must be borne in mind that by agreement between the employers and representative of Defendant Local the members of the latter were given an option of either spreading a 10% raise proportionately over all schedules (work classifications) or spreading such 10% increase disproportionately. At the largest meeting ever held by Defendant Local it was decided, upon motion of

one of the named petitioners, to submit this option to the membership, to be determined by secret ballot under the supervision of a disinterested Certified Public Accountant.

This was done and a majority voted in favor of a 10% increase for Schedule A, no increase for Schedule B and an increase of approximately 20% for Schedule C. This was done upon the assumption that making Schedule C so expensive to the employers would result in its elimination. At the time of the trial in Superior Court the use of Schedule C had in fact decreased by 50%.

The Superior Court found that the Memorandum Agreement was not intended to be a collective bargaining agreement but instead it was intended to be for the benefit of the persons who had the task of drafting the final collective bargaining agreements.

The District Court of Appeal affirmed this finding and stated that it was based upon adequate evidence. The Superior Court also found, as did the District Court that there was no breach of fair representation by Defendant Local.

A considerable portion of the petition is devoted to a recital of petitioners' evidence on the factual issue of whether the Memorandum Agreement was a final and binding agreement. It is evident that petitioners recognize that their asserted "Federal question of substance" cannot appropriately be raised until and unless this court were to first review all the evidence presented at trial and conclude therefrom, contrary to the conclusions of the District Court of Appeal, that the findings of fact made by the Superior Court were clearly errone-

ous. This court, on many occasions, has held that certiorari will be denied where review is sought of a lower court's opinion which turn solely upon an analysis of the particular facts or upon the construction of particular contracts.

As stated in *United States v. Johnson,* 268 U.S. 220, 227 (1925), "we do not grant a certiorari to review evidence and discuss specific facts." To the same effect is *General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175, 178 (1938), *Aetna Life Ins. Co. v. Dunken,* 266 U.S. 389, 394 (1924); *Portland Railroad, Light and Power Company v. Railroad Comm'n. of Oregon,* 229 U.S. 397, 411-412 (1913).

No Conflict of Decision Exists.

Petitioners do not point to any decision which is in conflict with that of the District Court of Appeal in the instant action. Furthermore, the only persons who could be concerned with or affected by the granting of the petition and a decision by this court contrary to that of the District Court of Appeal would be the petitioners.

The rule of law adhered to by the District Court of Appeal has long since been conclusively settled by the decisions of this court in *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953); *Humphrey v. Moore,* 375 U.S. 335 (1964); *Aeronautical Industrial District Lodge v. Campbell,* 337 U.S. 521 (1949); *Steele v. Louisville & Nashville Railroad Co.,* 323 U.S. 192 (1944). These decisions stand for the proposition which is clearly applicable to the instant case that a union in the exercise of its statutory power may, in collective bargaining, enter into agreements, be they original agreements

or modifications thereof, restricting the rights of all or a minority of the employees represented and what might in other areas of law be viewed as a deprivation of vested rights, so long as in so doing it does not breach its duty of fair representation by acting in bad faith or with hostility. Other decisions which touch upon this point are: *International Longshoremen's and Warehousemen's Union v. Kuntz,* 334 F. 2d 165 (9th Cir. 1964); *Hardcastle v. Western Greyhound Lines,* 303 F. 2d 182 (9th Cir. 1962), cert. denied 371 U.S. 920 (1962); *Potlatch Forests Inc. v. International Woodworkers of America,* 108 F. Supp. 906 (D. Ida. 1951), aff'd sub nom. *Olson v. Potlatch Forests, Inc.,* 200 F. 2d 700 (9th Cir. 1953); *Hartley v. Brotherhood of Ry. & S.S. Clerks,* 283 Mich. 201, 277 N.W. 885 (1938).

Conclusion.

For the foregoing reasons, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL G. LUDDY,
Counsel for Respondents Carman, et al.

APPENDIX A.

Statutes Involved.

Section 9(a) of the Labor Management Relations Act of 1947, as amended (61 Stat. 143, 29 U.S.C. § 159(a) (1964)), provides as follows:

> *"(a) Exclusive representatives; employees' adjustment of grievances directly with employer.*
>
> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment."

Section 301 of the Labor Management Relations Act of 1947, as amended (61 Stat. 156, 29 U.S.C. § 185 (1964)), provides in pertinent part as follows:

> *'§ 185. Suits by and against labor organizations.*
>
> *"(a) Venue, amount, and citizenship.*

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."